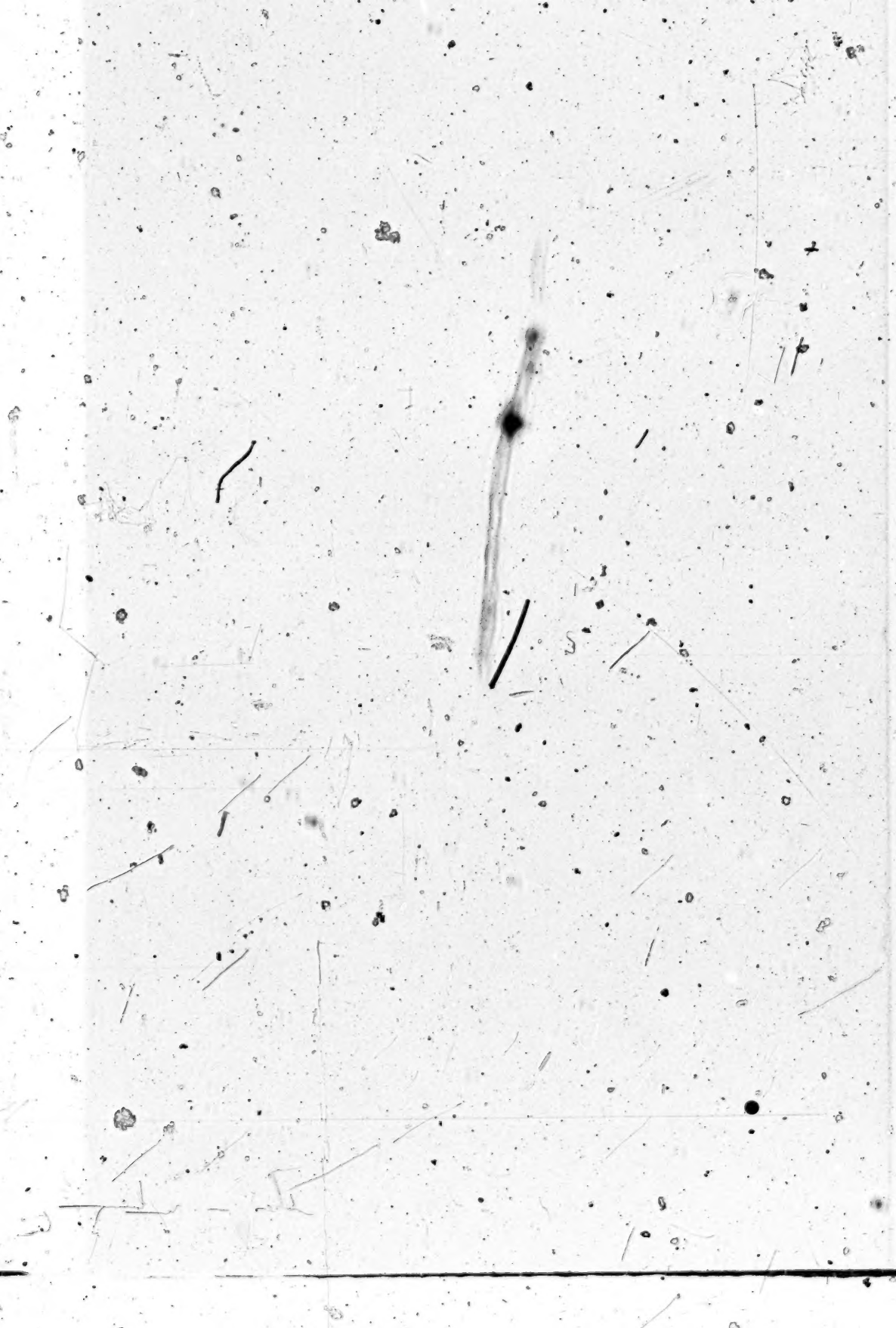

Supreme Court of the United States

October Term, 1951

No. 431

TESSIM ZORACH and ESTA GLUCK, *Appellants,*

against

ANDREW G. CLAUSON, JR., MAXIMILIAN MOSS, ANTHONY CAMPAGNA, HAROLD C. DEAN, GEORGE A. TIMONE and JAMES MARSHALL, constituting The Board of Education of The City of New York, and FRANCIS T. SPAULDING, Commissioner of Education of the State of New York,

and

THE GREATER NEW YORK COORDINATING COMMITTEE ON RELEASED TIME OF JEWS, PROTESTANTS AND ROMAN CATHOLICS, *Appellees.*

Appeal from the Court of Appeals of the State of New York

BRIEF FOR APPELLEE THE GREATER NEW YORK COORDINATING COMMITTEE ON RELEASED TIME OF JEWS, PROTESTANTS AND ROMAN CATHOLICS

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THE GREATER NEW YORK COORDINATING COMMITTEE ON RELEASED TIME OF JEWS, PROTESTANTS AND ROMAN CATHOLICS,

Appellees.

BRIEF FOR APPELLEE THE GREATER NEW YORK COORDINATING COMMITTEE ON RELEASED TIME OF JEWS, PROTESTANTS AND ROMAN CATHOLICS

The Basis of this Appeal

The petitioners have appealed to this Court under 28 U. S. Code §1257(2), permitting an appeal in a case "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity".

The Decisions Below

The appellant-petitioners commenced this proceeding in the New York Supreme Court, Kings County, by petition under Section 1296(1) of the New York Civil Practice Act, which is the statutory equivalent of a proceeding for a mandamus.

They asked for a final order imposing upon the respondents, the State Commissioner of Education and the New York City Board of Education, the "*non-discretionary* duties" of annulling forthwith and absolutely "the released time program," which was established in 1940 pursuant to Section 3210 of the New York Education Law and the regulations promulgated thereunder, and which permits children, whose parents so request, to be excused from public school for one hour a week for instruction, off the school premises, at religious centers and by religious teachers designated by the parents (R. 22). Petitioners claimed that both the statute and the regulations thereunder were unconstitutional *in toto* (R. 23).

In the Supreme Court, Kings County, Mr. Justice DiGiovanna entered a final order (R. 6-10) which dismissed the petition on the merits as a matter of law.

His opinion is found at R. 81-98, and is reported in 198 Misc. 631 and 99 N. Y. Supp. (2d) 339. He denied a motion for reargument with an opinion appearing in the New York Law Journal, Aug. 23, 1950, p. 299, col. 5, and attached as Appendix A to this Brief.

His order was affirmed by the Appellate Division (R. 107-111; 278 App. Div. 573), and by the Court of Appeals (R. 114, 142-3; 303 N. Y. 161).

STATEMENT OF THE CASE

The Position of this Committee

Pursuant to Section 1298 of the New York Civil Practice Act, this Committee, thrice mentioned in the petition (R. 18-20), was permitted to intervene by an unappealed order dated June 26, 1949, which made the Committee a party respondent, with leave "to file an answer" and "to be heard on all subsequent proceedings that may be had." The accompanying opinion is reported in 195 Misc. (N. Y.) 53.

The Committee is composed of an equal number of Jews, Protestants and Roman Catholics, *all laymen.* It was organized in 1923 for the purpose, among others, of furthering the "New York Plan of Released Time."

Accordingly the Committee participated in the two previous litigations in which the constitutionality of the New York Plan of Released Time was sustained by every judge in every court which considered it.

> *People ex rel. Lewis v. Graves,* 127 Misc. 135, aff'd 219 App. Div. 233; aff'd 245 N. Y. 195, rehearing denied 245 N. Y. 620 (1926-7);
> *People ex rel. Lewis* v. *Spaulding,* 193 Misc. 66, appeal dismissed 299 N. Y. 564 (1948-9).

The Committee now speaks in the name and interest of the hundreds of thousands of religious parents throughout the State of New York who stand upon their own constitutional rights under the First Amendment, and who strongly resent the attempts of these two petitioners to use the courts to force upon all parents—and upon the State of New York—the petitioners' own ideas as to how other people's children, enrolled in the public schools, must be exclusively educated.

They believe that the very essence of constitutional liberty in this country was unanimously expressed by the Supreme Court of the United States in *Pierce* v. *Society of Sisters,* 268 U. S. 510, in the following historic and profoundly American statement, the truth and wisdom of which have been increasingly solemnized by the tragic human history of the years since its utterance (pp. 534-5):

> "Under the doctrine of *Meyer* v. *Nebraska,* 262 U. S. 390, we think it entirely plain that the Act of 1922 unreasonably interferes with *the liberty of parents and guardians to direct the upbringing and education of children under their control.* * * * The fundamental theory of liberty upon which all governments in this Union repose *excludes any general power of the State to standardize its children by forcing them to accept instruction from public teachers only.* The child is not the mere creature of the State; those who nurture him and direct his destiny have the right, coupled with the high duty, to recognize and prepare him for additional obligations." (Italics ours.)

We submit that the time is ripe for reaffirmance of the basic principles thus enunciated.

The Nature of the Proceeding

The proceeding below was brought under Article 78, Section 1296(1) of the New York Civil Practice Act, which is the statutory equivalent of a proceeding for a writ of mandamus. That Section reads:

> "In a proceeding under this article, the questions involving the merits to be determined upon the hearing are the following only:
>
> 1. Whether the respondent failed to perform a duty specifically enjoined upon him by law."

The Sole Issue

The petition bases its case and its prayer for an order of mandamus exclusively upon the subdivision just quoted (R. 22-3).

The petition's target is Section 3210 of the New York Education Law which deals with attendance of children at schools, both public and private, and which lists various recognized reasons for permitted absence from both, including *"absence for religious observance and instruction"* (R. 15).

After citing (but not quoting) Section 3210 (R. 15), the petition sets forth the regulations established, pursuant to the statutory mandate, by the State Commissioner of Education (R. 15-16) and by the New York City Board of Education (R. 16-18). The petition then asserts as its issue of law and ground for a final order (R. 22):

> "TWENTY-THIRD: Rescissions of the aforesaid regulations and discontinuance of the released time program *are non-discretionary duties imposed upon respondents by the Constitution of the United States and of the State of New York as aforesaid."* (Italics ours.)

The constitutional provisions thus cited but not quoted are stated to be the First and Fourteenth Amendments to the Federal Constitution, and Section 3 of Article I of the New York Constitution (R. 21). This Section 3 of the New York Constitution guarantees "liberty of conscience" and "the free exercise and enjoyment of religious profession and worship, without discrimination or preference".

The same single issue of law, to wit, *"non-discretionary"* duty, is again tendered in petitioners' prayer for a final order (R. 23):

"Wherefore, your petitioners respectfully pray for an order directed against respondents and commanding respondent Board of Education *to discontinue the released time program as described in the petition and abrogate and rescind all regulations* established by it authorizing such released time program; and further commanding respondent Commissioner of Education to rescind and abrogate the regulations respecting released time established by the Commissioner of Education and to issue an order to respondent Board of Education directing said Board to rescind and abrogate the regulations respecting released time established by it as described in the petition, and to discontinue the released time program as aforesaid; and further granting petitioners such other and further relief as may be just and proper in the premises." (Italics ours.)

What the Petition Does Not Ask

1. The petition contains no allegations whatever that the regulations are not authorized by the Statute. *The sole charge is that the Federal and State constitutions forbid both the Statute and the regulations.*

2. The petition *does not ask* for the abolition or modification of any particular regulation or regulations. It asks for the abolition of all of them *in toto*.

3. The petition *does not ask* for any restraint or correction of any violation of the regulations or of the Statute challenged. It seeks not enforcement but permanent nullification *in toto* (R. 116).

4. The petition *does not ask* any better fulfillment of the Statute authorizing Released Time. On the contrary, it asks permanent nullification of both the Statute and Released Time *in toto*.

5. The petition *does not ask* any remedy for the particular benefit of these petitioners, and does not allege any particular injury to them. Indeed, Paragraph Twenty-second of the petition (R. 22) alleges that petitioners' own children,—as was their right—never took part in this voluntary Released Time program.

The Statutes Involved.

The petition (pars. "Sixth", R. 15, and "Twentieth", R. 21-2) directs itself against Section 3210 of the Education Law of New York, and particularly against Subsection 1(b):

The full texts of Section 3210 and of certain allied Sections are set forth in Appendix B attached to this Brief.

Section 3210-1(b), which was added in 1940 (L. 1940, Ch. 305), provides:

> "Absence for religious observance and education shall be permitted under rules that the commissioner [the State Commissioner of Education] shall establish."

The Journal of the Legislature shows that this amendment passed the Assembly by a vote of 132 to 7, and the Senate by a vote of 46 to 1 (R. 114).

The petition seeks to use the First Amendment in such wise as to expunge this enactment and to replace it with the reverse, to-wit, that the Education Law of New York must be deemed to have written into it by the First Amendment the following "*non-discretionary*" prohibition (R. 22):

> "Absence for religious education shall NOT be permitted."

The State which creates the Education Law may sanction *bona fide* absences. Appellants do not challenge the State's present sanction of absence, at parental request, for "instruction in music" or dancing, or because of "sickness", "quarantine", or "impassable roads", or attendance in court (*cf.* R. 54 and 118). But they absolutely deny that the State has any power at all to sanction any absence at parental request for instruction in the parents' religious faith.

Does the Constitution of the United States require such an absolute denial and prohibition?

For many decades the Education Law of New York has provided, with slight textual changes due to arrangement (Section 3204):

> "1. Place of instruction. A minor required to attend upon instruction by the provisions of part one of this article may attend at a public school *or elsewhere*. The requirements of this section shall apply to such a minor, irrespective of the place of instruction." (Italics ours.)

Citing this Section 3204 the Appellate Division, Fourth Department, recently delivered this unanimous decision concerning the proper construction and requirements of the State's Education Law (*People* v. *Turner*, 277 App. Div. 317, 319 (July 1950):

> "*There is no provision in the Education Law which prohibits instruction of children at home*, nor is there any provision requiring certification of a parent by the Commissioner of Education before she may teach her children at home.
>
> The State is interested in the education of a child for its own protection and the public good, for the purpose of developing good citizenship, but 'The child is not the mere creature of the State; those who nurture him and direct his destiny have the right

coupled with the high duty, to recognize and prepare him for additional obligations.' (*Pierce* v. *Society of Sisters*, 268 U. S. 510, 535.) * * *

The object of a compulsory education law is to see that children are not left in ignorance, that from some source they will receive instruction that will fit them for their place in society. *Provided the instruction given is adequate and the sole purpose of non-attendance at school is not to evade the statute*, instruction given to a child at home by its parent, who is competent to teach, should satisfy the requirements of the compulsory education law. (See *Wright* v. *State*, 21 Okla. Cr. 430; *People* v. *Levisen*, 404 Ill. 574.)

In the *Levisen* case (*supra*) the statute required attendance at a public or private or parochial school, and the court held that competent home instruction came within the purview of attendance at a private school. The New York statute is obviously broader." (Italics ours.)

The Court of Appeals in the case at bar took a similar view of the State's Education Law and its requirements (R. 118-9, 121).

Furthermore, as accurately said by the Court of Appeals (R. 121):

"The New York City Board of Education provides more days for secular instruction than required by law (Education Law, §3204, subd. 4). The Education Law does not fix the number of hours that constitute a school day."

Governor Lehman's Approving Memorandum

The well-nigh unanimous action of the Legislature in enacting the Statute now attacked, was approved in 1940 by Governor Lehman, "whose devotion to constitutional liberties needs no encomium" (concurring opinion of Judge Desmond, R. 125). In approving the Statute, Governor Lehman filed this memorandum (R. 27-29):

> "Under this bill the State Commissioner of Education shall establish rules under which children may on certain occasions be permitted to leave school for the purpose of attending their religious observances and receiving religious education.
>
> For some time it has been the practice in many localities in the State to excuse children from school a certain period each week for religious instruction. The board of regents has recognized the right of local school boards to do this. The Court of Appeals unanimously held that the practice was within the letter and the spirit of our Constitution and laws. In so holding the Court of Appeals pointed out: 'Neither the Constitution nor the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support.'[*].
>
> However, at the present time there is no uniformity of practice throughout the State. Nor is any officer or agency of the State authorized or charged with the responsibility of adopting rules under which absences for religious observance or instruction may be permitted. This bill will assure some uniformity and permanency by placing the authority and responsibility upon the State Commissioner of Education to adopt such rules.
>
> *"A few people have given voice to fears that the bill violates principles of our Government. These fears in my opinion are groundless. The bill does not introduce anything new into our public school system nor does it violate the principles of our public educational system."* (Italics ours.)

---

* *People ex rel. Lewis* v. *Graves*, 245 N. Y. 195, 198.

The Regulations Adopted by the State Commissioner of Education

Pursuant to the 1940 statutory mandate, the State Commissioner of Education promulgated, on July 4, 1940, the following Regulations which are set forth in the petition and are still in force (R. 15-16):

"1. Absence of a pupil from school during school hours for religious observance and education to be had outside the school building and grounds will be excused upon request in writing signed by the parent or guardian of the pupil.

2. The courses in religious observance and education must be maintained and operated by or under the control of a duly constituted religious body or of duly constituted religious bodies.

3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities.

4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week.

5. Such absence shall be for not more than one hour each week at the close of a session at a time to be fixed by the local school authorities.

6. In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular public school in such district shall be the same for all such religious schools."

The Regulations of the Board of Education of the City of New York

On November 13, 1940, the Board of Education of the City of New York, pursuant to the same 1940 statutory mandate, issued the following Regulations which are set forth in the petition (R. 16-18):

"1. A program for religious instruction may be initiated by any religious organization, in cooperation with the parents of pupils concerned. There will be no announcement of any kind in the public schools relative to the program.

2. When a religious organization is prepared to initiate a program for religious instruction, the said organization will notify parents to enroll their children with the religious organization, and will issue to each enrolled pupil a card countersigned by the parent and addressed to the principal of the public school, requesting the release of the pupil from school for the purpose of religious instruction at a specific location. The said cards will be filed in the office of the public school as a record of pupils entitled to be excused, and will not be available or used for any other purpose.

3. Religious organizations, in cooperation with parents, will assume full responsibility for attendance at the religious center and will file with the school principal weekly, a card attendance record and in cases of absence from religious instruction, a statement of the reason therefor.

4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on Wednesday of each week, except that in classes on a departmental schedule release will be limited to the last period of the program.

5. Pupils released for religious instruction will be dismissed from school in the usual way and the school authorities have no responsibility beyond that assumed in regular dismissals.

6. There shall be no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction."

These Regulations have been continued without change except that Regulation No. 4 was amended by the Board of Education on September 24, 1941, to read as follows (R. 18):

"4. Upon the presentation of a proper request as above prescribed, pupils of any grade will be dismissed from school for the last hour of the day's session on one day of each week to be designated by the Superintendent of Schools: A different day may be designated for each borough."

This is the Fourth Assault

This is the fourth attempt during the last twenty-five years to induce the courts to knock out, as unconstitutional under the Federal and State Constitutions, the "New York Plan For Released Time;" now representing the voluntary desire of the parents of over 200,000 children in the State of New York and of over 2,000,000 children throughout the United States (R. 121).

(1) The first attempt was in 1926-7. It was made against a like Plan adopted by the School Board of the City of White Plains (R. 118). It failed without benediction from a single one of the thirteen judges who heard the case (*People ex rel. Lewis* v. *Graves*, 127 Misc. 135; aff'd 219 App. Div. 233; aff'd 245 N. Y. 195, rehearing

denied, 245 N. Y. 620). The Judges of the New York Court of Appeals who so decided were: Cardozo, Ch.J., Pound, Crane, Andrews, Lehman, Kellogg and O'Brien, JJ.

As shown by the Record on Appeal therein, the petition of Lewis, verified January 15, 1926, expressly charged (Par. VI, fol. 28) (R. 119):

> "The functions of the public schools of White Plains are thus delegated to the churches for 45 minutes each week in violation of the constitutional guarantees of the New York State *and the United States Constitutions* respecting religious liberty and the separation of church and state." (Italics ours.)

In paragraph VIII of his same petition Lewis alleged that the White Plains Plan violated the (fol. 30)

> "constitutional guarantees, State *and Federal*, respecting religious liberty and the separation of church and state as aforesaid." (Italics ours.)

In his prayer for relief Lewis asked for a mandamus imposing the non-discretionary duty upon the State Commissioner of Education and the Superintendent of the Public Schools of White Plains to annul the whole plan as (fol. 39)

> "in violation of the laws and constitutions of this State and of the *United States* respecting education and the separation of church and state." (Italics ours.)

Nevertheless, and notwithstanding these claims under the United States Constitution, reasserted by the petitioners in the present proceeding, Lewis failed to carry his case to the United States Supreme Court.

We respectfully urge upon this Court close consideration of the learned opinions written by all three courts in that litigation.

(2) The second attempt was in 1947. It was made outside of New York, but against a like Statute and Plan. *Gordon v. Board of Education of the City of Los Angeles*, 78 Cal. App. 2d 464; 178 P. 2d 488; review denied by California Supreme Court, 78 Cal. App. 2d 464, 481. Again not a single judge dissented.

(3) The third attempt was again made in New York, and was again spearheaded by Joseph Lewis. It was begun in 1948 *after* the decision of this Court in the *McCollum* case. The attempt failed before Mr. Justice Elsworth, whose opinion dismissed the petition, the basic claims in which are reproduced in the present petition (193 Misc. 66).

The present appellants were aware of the pendency of that case when they began the present proceeding (R. 72).

The then petitioner, Joseph Lewis, again invoked the Constitution of the United States, and appealed to the Court of Appeals on the same constitutional grounds as are now urged. When the case was called for argument on April 11, 1949, his counsel, over our objection, withdrew his appeal, which was accordingly dismissed (299 N. Y. 564).

(4) The present is the fourth attempt. *It seeks to destroy a program which has been a settled part of the educational system of New York for twenty-five years*, has been repeatedly upheld by all the courts of that State, has been widely followed elsewhere, and has afforded at least a modicum of liberty of conscience to myriads of parents and children.

The Gravity of the Issue

The case at bar presents one of the most crucial issues of civil and religious liberty ever submitted to this Court.

In March, 1948, the National Education Association and the American Association of School Administrators approved the Report of their Joint Educational Policies Commission, entitled "Education for *All* American Children." That report advocated "the lengthening of the school day," "the year round school plan," and that "the schools are almost never closed." It emphasized the "home-work" projections of the secular curriculum.

We cite this Report not to take issue with it, but merely to show that we have not yet reached the end of the ever lengthening and widening road which the State as *the* educator of all children has been travelling from its simple and brief beginning in the three R's toward almost total absorption of the so-called "business hours" of children,—the sum total of the time available for their mental and physical capacity for education.

We cite this Report also for its implicit portrayal of the truth that whoever can get hold of the control of education can by lengthening and expanding the secular programs absorb for their purposes *all* the "business hours" of the child as they may choose to fix such "hours".

In the midst of this continuing expansion of public secular education, from which all religious instruction is said to be constitutionally barred, millions of parents have come to feel, as they have a constitutional right to feel, that this system in and of itself is indoctrination in a secular philosophy of life, and tends to inculcation, however unintentional, of materialistic behavior tendencies,

which such parents feel that they should not be forced to attempt to counteract and undo in order that their children may have such spiritual and religious outlooks and faith as the parents consider essential for their children's welfare and destiny here and hereafter.

Is the State really compelled by the Constitution to say to all religiously-minded parents:

> "If you do not want your child, who is in the public school, to have a 100% education in what you have the constitutional right to regard as sheer secularism, you must nevertheless go on paying your school tax and yet send him to a private or parochial school,—if you are lucky enough to find an acceptable one and are rich enough to afford it. But if you once enroll him with us—as most of you have to do—the Constitution says that all his 'business hours' must belong exclusively to us for that kind of secular education and for as many hours in and out of the school buildings as we shall fix. We would like to respect your wishes and your liberty of conscience, and let you have elsewhere a small part of those 'business hours' to teach your child the faith of his fathers, but the Constitution says that we cannot and the courts say that we must not."

Is that the free exercise of religion guaranteed by the First Amendment?

Is that the sole alternative which the Constitution forces the states to force upon parents who have, and wish to exercise, a constitutional right to view with deep concern for their children the consequences of such a vast and exclusively secular system of education?

Does the Constitution throw upon such parents the burden and task of attempting, outside the "business hours" available physically and mentally for the education of their children, to counteract and undo the behavior

tendencies and the trends of character, action and belief which they have the right to fear and to regard as the consequences of such a system?

Must free people, presumed to be guaranteed by their Constitution the free exercise of inalienable rights, accept, as a corollary of the same Constitution, that the State is so far in control of education that whoever can lay their hands on the levers of such control, can through the public schools get control of shaping the minds, loyalties and behavior trends of the successive ranks of the people's children?

The basic and grave issue here is as simple and bare as its following formulation in the opinion of the Court of Appeals (R. 121):

> "Because the public school must be kept separate and apart from the church, pupils may not constitutionally receive religious instruction therein. All that New York parents ask then is that their children may be excused one hour a week for that purpose."

This far-reaching constitutional issue was neither presented nor decided in the *McCollum* case (333 U. S. 203). (See Point III, p. 52, *post.*) It is presented for decision now.

It was met and decided by the New York Court of Appeals in these words (R. 120):

> "While extreme care must, of course, be exercised to protect the constitutional rights of these appellants, it must also be remembered that the First Amendment not only forbids laws 'respecting an establishment of religion' but also laws 'prohibiting the free exercise thereof'. We must not destroy one in an effort to preserve the other. We cannot, therefore, be unmindful of the constitutional rights of those many parents in our State (we are told that some 200,000 children

> are enrolled in the released time programs in this jurisdiction, and ten times as many throughout the nation) who participate in and subscribe to such programs."

Or, as Judge Desmond put it in his concurring opinion (R. 126):

> "The true and real principle that calls for assertion here is that of the right of parents to control the education of their children, so long as they provide them with the State-mandated minimum of secular learning, and the right of parents to raise and instruct their children in any religion chosen by the parents."

There is nothing in the United States Constitution which commands that religious instruction shall be given only on the Sabbath or in such marginal moments as can be begged or coaxed after the child's "business hours". The Church is not a poor relative in the house of the State.

Summary of Argument

I. The New York Statute does not violate the First Amendment. On the contrary, it merely recognizes and implements the constitutional rights and responsibilities of parents, and the liberty of conscience which the First Amendment guarantees. (*Infra*, pp. 20-45.)

II. The New York Statute authorizing Released Time is designed to give reasonable protection to liberty of conscience and freedom of religious profession on the part of parents.

No constitutional provision erects a gateless "wall of separation" between the State and parents, or between parents and their children, in the matter of public education. (*Infra*, pp. 46-52.)

III. The New York Statute and regulations present a situation altogether different from that of the *McCollum* case. (*Infra*, pp. 52-62.)

IV. The petition presents no triable issue of fact. (*Infra*, pp. 62-72.)

POINT I

The New York Statute does not violate the First Amendment.

On the contrary, it merely recognizes and implements the constitutional rights and responsibilities of parents, and the liberty of conscience which the First Amendment guarantees.

A. The underlying bases of the Statute

(1) In 1938 the citizens of New York adopted a Constitution with this Preamble:

> "WE, THE PEOPLE of the State of New York, grateful to Almighty God for our Freedom, in order to secure its blessings, DO ESTABLISH THIS CONSTITUTION."

This Preamble, expressive of a religious tenet taught by the Old and New Testaments alike and thus given affirmance by the State, has appeared in every Constitution of New York State since 1821. As such it is part of an instrument of government supported and enforced

by public taxes and by salaried public officers sworn to support the same (N. Y. Constitution, Art. XIII, Sec. 1).

Preambles expressing similar gratitude to Almighty God as the Author and Protector of our freedom and its blessings appear in the Constitutions of every state in the Union (except West Virginia) and have so appeared from the earliest times.

The Declaration of Independence had as its text the religious tenet that the "Creator" was the Author of these "unalienable rights" to the defense of which our forefathers, "with a firm reliance on the protection of Divine Providence", mutually pledged "our lives, our fortunes, and our sacred honor". The United States Constitution is, and was intended to be, an embodiment of the principles in that great Declaration. (*Gulf, Colorado and Santa Fe Railway* v. *Ellis*, 165 U. S. 150, 160; *Butcher's Union, etc., Co.* v. *Crescent City, etc., Co.*, 111 U. S. 746, 756.)

Has the momentum of secularism become such that we have now reached a point where no Legislature in the Union, although created and thus dedicated by the State Constitution and endowed with full legislative power, may constitutionally recognize a right in parents to request the absence of their children from public school for one hour a week in order that they may learn to be "grateful to Almighty God for our Freedom", and to the "Creator" who has endowed them with their "unalienable rights"?

(2) The same Constitution of the State of New York solemnizes this Preamble by affirming (Art. I, sec. 3) "the liberty of conscience hereby secured", and by asserting that:

> "The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all mankind."

This provision was copied almost verbatim from the original New York Constitution of 1777, adopted amid the echoes of the Declaration of Independence.

Millions of parents throughout this country believe with deepest conviction that the momentum of secularism is a basic cause of the world's ills, and that it undermines the very cornerstone of our freedom as expressed in these constitutional Preambles and in the Declaration of Independence. Those millions of parents have a constitutional right so to believe, and to demand reasonable freedom and respect for that belief in and amid the education of their children.

Can other parents or other groups now use these same constitutional guaranties to impose upon everyone, including the State itself, their own theories as to the contents and implications of the education of other people's children? Can they force upon other parents the task of endeavoring to undo after the child's "business hours" the implications which those other parents fear?

Is there, to quote *Beard* v. *Alexandria*, 341 U. S. 622, 626, "an iron standard to smooth their path by crushing the living rights of others"?

(3) The groups which now gather to destroy the Plan under which the people of New York, and of many other States, have been successfully living for some decades, are, we submit, deceiving themselves.

In the name of liberty, they are for striking down what this Court in *Pierce* v. *Society of Sisters* (268 U. S. 510, 534-5) truly said was a basic part of "the fundamental theory of liberty upon which all governments in this Union repose."

In the name of protecting religious freedom, they are pressing for judicial interpretations which can sanction a

state absolutism in the matter of education capable of undermining and destroying all religion at its very seat of life,—the mind of the child.

In the name of preventing divisiveness, they now present and create divisiveness in its most explosive and mischievous form,—marshalling groups against other groups for the purpose of compelling the latter to submit to the formers' views as to the educational impacts to be made on the minds of the latters' children.

(4) This is not a case where a local school board has attempted to curtail for any pupil the number of compulsory hours in school, or the number of compulsory subjects of instruction, or the place of compulsory attendance, as fixed by State law (R. 121).

Nor is this a case where a local school board has attempted to add a new excuse for absence to those recognized or permitted by State law.

This is a case where the Legislature itself has acted, and has by law declared the policy of the State as to permitted absences from compulsory attendance in the school building during school hours,—"religious observance and education". The State itself, acting through the Legislature, has, in the words of the New York Court of Appeals, made *"this sincere and most scrupulous effort to find an accommodation between constitutional prohibitions and the right of parental control over children"* (R. 120).

As said in *Beard* v. *Alexandria*, 341 U. S. 622, concerning the application of the Constitution's provisions to legislative action (p. 623):

> "The problem is legislative where there are reasonable bases for legislative action."

The question therefore arises as to whether this legislative determination in the fashioning of the Education

Law of the State must be brought under review and veto by this Court in the name of the First Amendment. What would be the logical and natural consequences to our system of government and our conception of personal liberties if this Court attempted such a review and veto?

Would not this Court become a super Educational Authority to decide what excuses for absence may or may not be authorized by a State?

And how far would the principles underlying such a veto, and the implications thereof, reach beyond the educational field and invite efforts to bring this Court into censorship over the innumerable instances and authoritative declarations in the public life of this nation wherein since this nation's birth there have been and still are official profession of faith, trust and gratitude as regards Almighty God, and official recognition of the value and need of religion in the life of the people? (R. 131).

If the onrushing currents of secularism throughout the world *must* exclude the religious convictions of parents from any recognition at all amid public education, then the Constitution itself can become the instrument of regimentation and of sweeping religion and the Church into a backwater of life.

Such is the appalling lesson of all the systems of Brown, Black and Red Shirts throughout the last twenty years—not to go back further in the history of tyranny.

Such also is the dismaying lesson of what would have happened in Nebraska and Oregon if this Court had not intervened (*Meyer* v. *Nebraska*, 262 U. S. 390, and *Pierce* v. *Society of Sisters*, 268 U. S. 510).

B. Supporting decisions in this and other Federal Courts

In *Holy Trinity Church* v. *United States*, 143 U. S. 457 (1892), this Court unanimously said (p. 465):

> "But beyond all these matters no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation."

In *Meyer* v. *Nebraska*, 262 U. S. 390 (1923), this Court held (to quote the headnote):

> "A state law forbidding, under penalty, the teaching in any private, denominational, parochial or public school, of any modern language, other than English, to any child who has not attained and successfully passed the eighth grade, invades the liberty guaranteed by the Fourteenth Amendment and exceeds the power of the State."

This Court further said (p. 401):

> "That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; *but the individual has certain fundamental rights which must be respected.*" (Italics ours.)

In *Bartels* v. *Iowa*, 262 U. S. 404 (1923) this Court reaffirmed this ruling.

In *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925) this Court unanimously held unconstitutional the Oregon Compulsory Education Act, which, with certain exemptions, required every parent or guardian of a child between the ages of eight and sixteen to send him to the public school in the district where he resided, for the

period during which the school was held in the current year. This Court made the historic declarations (pp. 534-5) which have already been quoted, p. 4, *supra*.

In *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 625 (1943), this Court did not require the abolition of the entire flag salute program, but merely held unenforceable its compulsory features with respect to those (Jehovah's Witnesses) having conscientious objections to participation.

In *Prince* v. *Massachusetts*, 321 U. S. 158 (1944), this Court said (p. 166):

> "*It is cardinal with us that the custody, care and nurture of the child reside first in the parents*, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder." (Italics ours.)

In *Everson* v. *Board of Education*, 330 U. S. 1 (1947), this Court upheld as constitutional a New Jersey statute authorizing District Boards of Education to make contracts for the transportation of children, at public expense, to parochial schools. Writing for the Court, Mr. Justice Black said that this enactment was within the "state's power to legislate for the public welfare" (p. 6), and that (pp. 16, 18):

> "On the other hand, other language of the [First] Amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion".

In *In re Stuart*, 114 Fed. (2d) 825 (1940) the United States Court of Appeals for the District of Columbia said (p. 832):

> *"Under our constitutional system, the citizen has more than a revocable privilege to possess and to rear his children.* Under our theory of government there is recognized as inherent in parents a right to maintain the custody and to direct the upbringing and education of their own offspring." (Italics ours.)

C. The "natural rights" of parents. Their "unalienable rights"

(1) These decisions represent the traditional American conception of "natural rights" which underlie and precede the Bill of Rights.

As said by this Court in *U. S.* v. *Cruikshank*, 92 U. S. 542, 553 (1875):

> "The rights of life and personal liberty are *natural rights of man.* 'To secure these rights', says the Declaration of Independence, 'governments are instituted among men, deriving their just powers from the consent of the governed.'" (Italics ours.)

In *People* v. *Barber*, 289 N. Y. 378 (1943), the Court of Appeals of New York said, *per* Chief Judge Lehman (p. 385):

> "It (the Bill of Rights) is a guarantee of those rights which are essential to the preservation of the freedom of the individual—rights which are part of our democratic traditions and which no government may invade."

The present proceeding is, both directly and in its implications, an attack upon these basic natural and civil liberties thus repeatedly declared in repeated decisions by this Court.

In all these decisions religious believers are told that "the liberty of parents and guardians to direct the up-

bringing and education of children under their control" is a basic part of "the fundamental theory of liberty upon which all governments in this Union repose" (*Pierce* v. *Society of Sisters*, 268 U. S. 510, 534-5).

In all these decisions religious believers are told that the First Amendment "does not require the State to be their adversary"; that the public school may not use its educational authority in ways or with implications which "hamper" or are contrary to religious convictions of the parents or which require parents to undo what they fear therefrom; and that, in the name of public welfare, the State may relieve them of the cost of transporting their children to parochial schools of their choice.

But now come these appellants with different ideas. They seek to force the State to tell all parents that, however deep their fears may be as to a vast system of exclusively secular education, the State cannot show them therein the slightest measure of accommodation.

(2) *Stated nakedly, the issue in its ultimate reach is between State absolutism in public education, and the natural and constitutional rights of parents.*

Since this issue is fundamental, we had best get back to fundamentals in analyzing it.

Our best starting point is the Declaration of Independence. This Court has said (*Gulf, Colorado and Santa Fe Railway* v. *Ellis*, 165 U. S. 150, 160 [1897]):

> "the latter [the Constitution] is but the body and the letter of which the former [the Declaration] is the thought and the spirit, and it is always safe to read the letter of the Constitution in the spirit of the Declaration of Independence."

The Declaration of Independence asserts as "self-evident truths" that:

> "*all men* are endowed by their Creator with certain unalienable Rights";

and that

> "to *secure* these Rights, Governments are instituted among Men".

The Founding Fathers in general, and their draftsman Thomas Jefferson in particular, knew exactly what they were doing and meant when they used those words.

In the first place, they intended to make it plain for all time that the natural and "unalienable rights" of the citizen come from the Creator and hence are beyond withdrawal by the State, and that they do not come from the State which can withdraw tomorrow what it grants today.

In the second place, they intended to make it plain for all time that the State exists to "*secure*" those rights, not to "grant" them.

These distinctions are not mere pieces of pious rhetoric or of speculative philosophy. They lie at the root of our whole constitutional system and are the issue which confronts and divides our tragic world today. They are the decisive factors in this case. See the statements of Mr. Justice Field in his concurring opinion in *Butcher's Union, etc., Co. v. Crescent City, etc., Co.*, 111 U. S. 746, 756.

Once we admit that the State is the source of all rights, "unalienable rights" cease to be even an intellectual concept.

The citizen then becomes the mere creature of the State and of those in control of the State. No matter what governmental forms are preserved or receive lip-service, freedom collapses and police-enforced regimentation and conformity take its place.

(3) *The next question to consider is what are the "unalienable rights" referred to in the Declaration as the rights with which "all men are endowed by their Creator."*

For present purposes it is not necessary to catalogue them all. After the right to life, the most fundamental and "unalienable" right of all is the right to marry, establish a home and rear a family. A moment's consideration will demonstrate that if that right is denied, almost all other rights lose their meaning and existence.

Or, to put it a little differently, in the free society contemplated by the Declaration of Independence and safeguarded by the Constitutions of the United States and of all the States, *the family and not the State is the fundamental unit.* The State exists to protect the citizen and his family. The citizen and his family are neither the creatures nor the slaves of the State. Nor is the rearing and education of children a function which the State *grants or delegates* to the parents.

The right to marry, establish and maintain a home, and rear a family carries with it both the right and the duty to educate (in the full sense of that term) one's own children in accordance with the dictates of one's conscience and faith. That right was recognized and upheld by the common law long before written Constitutions were framed. It is only by totalitarian states, and by those who insist on state totalitarianism in education, that this right is denied.

All of the foregoing has been well summed up, and embodied in our constitutional law, by this Court in *Meyer v. Nebraska,* 262 U. S. 390 (pp. 399, 400):

> "Without doubt, it (natural, common law liberty) denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, *to marry, establish a home and bring up children, to worship God according to the dictates*

> *of his own conscience,* and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men." (Italics ours.)

The same basic principles are well stated in *Matter of Livingston,* 151 App. Div. (N. Y.) 1, 7.

In *Denton* v. *James,* 107 Kans. 729 (193 Pac. 307), it is said:

> "Sometimes it is declared that the rearing of children is a function which the state delegates to parents, and which it may resume at will, for its welfare, through welfare of the child. *The rearing of children is not in fact a function delegated by the state to the citizen, any more than the begetting of children is a delegated state function,* and the theory of government recognized by the declaration is responsible for absolutism in its most tyrannical form. * * * The interest which a parent has in the nurture of his own offspring, and in fearness to them for that purpose, lies in a different plane from that occupied by property; *it transcends property. On the child's side, it has no higher welfare than to be reared by its parents. The state has no higher welfare than to have children reared by their parents, and free government is instituted for the protection and benefit of parenthood as one of the natural rights which the citizen possesses."* (Italics ours.)

(4) Since it is the parent, and not the State, who has both the primary right and the primary duty of educating his child, it necessarily follows that the teacher—whether public or private—must be regarded as primarily the agent or delegate of the parent, and not exclusively as the agent or delegate of a State omnipotent over education.

The principle above stated by this Court in the *Meyer* and *Pierce* cases was nothing new. It had been recognized

since the foundation of the Republic and is nowhere better expressed than in the opinion of the Court of Quarter Sessions in the early case of *Commonwealth* v. *Armstrong*, 1 Penna. Law Journal Reports (1848) 392, 393-4 and 396-8:

> "The authority of the father results from his duties. He is charged with the duties of maintenance and education. These cannot be performed without the authority to command and enforce obedience. *The term education is not limited to the ordinary instruction of the child in the pursuits of literature. It comprehends a proper attention to the moral and religious sentiments of the child.* • • • No teacher, either in religion or in any other branch of education, has any authority over the child, except what he derives from its parent or guardian; and that authority may be withdrawn whenever the parent, in the exercise of his discretionary power, may think proper. • • •
>
> "It *is dangerous to depart from established principles.* Parental authority is not to be subverted so long as it is exercised within the limits which the law has prescribed." (Italics ours.)

Of this decision Chancellor Kent of New York wrote:

> "I have received and read with much pleasure your opinion in the case of *Commonwealth* v. *Armstrong* and I agree with your reasoning and conclusion." (1 Penna. Law Journal Reports 398.)

The same fundamental principle was repeated and unanimously approved in every court of New York in the previous attacks on the New York Plan for Released Time by Joseph Lewis, the appellants' predecessor. (127 Misc. 135, 139-40 (Sup. Ct. Albany Co., Staley, J., 1926); 219 App. Div. 233, 238-9 (3rd Dept., 1927); 245 N. Y. 195 (1927), rehearing denied 245 N. Y. 620; 193 Misc. 66 (Elsworth, J., 1948); appeal dismissed 299 N. Y. 564.)

(5) Appellants' counsel have suggested that the religious freedom of parents, and their right to control the education of their children, could be adequately safeguarded by sending children to private or parochial schools.

Such an argument finds no support in justice, practicability or sound reason, and runs directly counter to established principles of constitutional law.

Why should a religious parent be required to pay taxes for the public school, if the only escape from his fear of secularism in education is to send his child to a private or parochial school which may or may not exist in his community, and which may or may not be within his means or meet his convictions?

The public school is not—except in the mind of appellants—the vassal of an all-powerful secular State. It is an agency created by the State to assist parents in discharging their primary duty of educating their own children. By sending his children to the public school, the parent does not forfeit, waive or suspend his fundamental constitutional rights and religious convictions. The parent of a public school child is not a second-class or inhibited citizen. Nor is the public school child himself the mere creature or chattel of the State—*even during school hours.*

D. Decisions upholding the rights of parents in matters of public education

The courts have consistently recognized and upheld the right of the parents, exercising liberty of conscience, even to reject courses prescribed by the public school, in order to give other and different instruction, or to fulfill religious exercises, outside the school.

(1) In *School Board* v. *Thompson*, 24 Okla. 1 (103 Pac. 578), the school authorities of the public school had prescribed *singing lessons* as part of the compulsory curriculum. The parents of certain children refused to permit them to take these lessons, and requested that they be excused. The school authorities declined this request and, when the children refused to participate in the singing exercises, they were expelled. The Court not only reinstated the children by mandamus, but held (to quote the headnote):

> "At common law the principal duties of parents to their legitimate children consisted in their maintenance, their protection, and their education. * * * The school authorities of this State * * * may prescribe the courses of study and textbooks for the use of the schools. * * * The parent, however, has a right to make a reasonable selection from the prescribed course of study for his child to pursue, and this selection must be respected by the school authorities, *as the right of the parent in that regard is superior to that of the school officers and teachers.*" (Italics ours.)

In the course of the opinion the Court said (p. 9):

> "It is no argument in favor of limiting the common-law authority and control of parents over their children to say that the exercise of such power may result disastrously to the proper discipline, efficiency, and well-being of the schools. It is to be presumed that a normal reasonable man will exercise such authority in a reasonable way."

In *Hardwick* v. *Board of School Trustees*, 54 Cal. App. 696 (205 Pac. 49), the Court held that a school board could not, against the will of a parent, compel a pupil in a public school to take *dancing lessons* as part of the prescribed curriculum. On the subject of the authority of the parent, the Court said (p. 709):

"In truth, the proposition even extends beyond the question of the ultimate effect of dancing exercises upon minor children. It also involves the right of parents to control their own children—to require them to live up to the teachings and the principles which are inculcated in them at home under the parental authority and according to what the parents themselves may conceive will be the course of conduct in all matters which will the better and more surely subserve the present and future welfare of their children. * * *. *Indeed, it would be distinctly revolutionary and possibly subversive of that home life so essential to the safety and security of society and the government which regulates it, the very opposite effect of what the public school system is designed to accomplish, to hold that any such overreaching power existed in the state or any of its agencies.*" (Italics ours.)

This determination was affirmed by the Supreme Court of California (54 Cal. App., 714; 205 Pac. 56).

In *State* v. *School District*, 31 Nebraska 552 (48 N. W. 393), the Court awarded a peremptory writ of mandamus requiring the trustees of a public school district to restore to the privileges of the school a pupil whose parent had, on conscientious grounds, refused to allow her to study *grammar*, which was one of the prescribed subjects.

In *Trustees* v. *People*, 87 Ill. 303 (29 Am. Rep'ts 55), it was held, concerning the public school system of Illinois and the subject of grammar (to quote the headnote):

"Where the relator's son passed a satisfactory examination in all the studies taught in a high school, except that of *grammar*, which the father did not desire him to study, and was refused admission to pursue the other branches simply for his deficiency in grammar. *Held*, on a proceeding by mandamus, that as the father did not wish his son to study grammar,

the son had a right to admission as to the other studies, and that any rule or regulation excluding a pupil on that ground was unreasonable and could not be enforced."

Morrow v. *Wood*, 35 Wisc., 59 (17 Am. Rep'ts 471), presented the question of the right of the public school authorities to force a child to study the prescribed course in *geography*, which was given according to the common concepts of the shape of the earth, in the face of a contrary direction by the child's father, who held different concepts on religious grounds. The Court held that the parent's right was paramount. The Court said (p. 65):

> "Whence, we again inquire, did the teacher derive this exclusive and paramount authority over the child, and the right to direct his studies contrary to the wish of the father? It seems to us it is idle to say the parent, by sending his child to school, impliedly clothes the teacher with that power, in a case where the parent expressly reserves the right to himself, and refuses to submit to the judgment of the teacher the question as to what studies his boy should pursue."

In *State* v. *Ferguson*, 95 Nebraska 63 (144 N. W. 1039), a parent refused to allow his daughter to attend in public school a class in *domestic science*, which was one of the prescribed courses. She was thereupon expelled. The Court granted a mandamus for her reinstatement. The Court cited *Trustees* v. *People*, 87 Illinois, 303 (29 Am. Rep'ts 55), *supra*, and said (p. 74):

> "Our public schools should receive the earnest and conscientious support of every citizen. To that end the school authorities should be upheld in their control and regulation of our school system; *but their power and authority should not be unlimited.* They should exercise their authority over and their desire to further the best interests of their scholars, with a

due regard for the desires and inborn solicitude of the parents of such children. They should not too jealously assert or attempt to defend their supposed prerogatives. *If a reasonable request is made by a parent, it should be heeded.*" (Italics ours.)

In *Rulison* v. *Post*, 79 Ill. 567, a public school pupil at the direction of her parents refused to take a prescribed course in *bookkeeping*. She was thereupon expelled. In its opinion the Court said (p. 573):

"Parents and guardians are under the responsibility of preparing children intrusted to their care and nurture, for the discharge of their duties in after life. Law-givers in all free countries, and, with few exceptions, in despotic governments, have deemed it wise to leave the education and nurture of the children of the State to the direction of the parent or guardian. This is, and has ever been, the spirit of our free institutions. The State has provided the means, and brought them within the reach of all, to acquire the benefits of a common school education, *but leaves it to parents and guardians to determine the extent to which they will render it available to the children under their charge.*" (Italics ours.)

(2). Unless these principles are maintained, a system of State education becomes but the means to mould people to such common likeness in thought, behavior and manners as pleases the predominant power.

It then becomes one more manifestation of that governmental paternalism which eats into democracy and individual freedom like a corrosive chemical.

In *State ex rel. Kelley* v. *Ferguson*, 93 Neb. 63 (144 N. W. 1039), the Court said (pp. 73-4):

"The public school is one of the main bulwarks of our nation, and we would not knowingly do any-

thing to undermine it; *but we should be careful to avoid permitting our love for this noble institution to cause us to regard it as 'all in all' and destroy both the God-given and constitutional right of a parent to have some voice in the bringing up and education of his children.* * * * The state is more and more taking hold of the private affairs of individuals and requiring that they conduct their business affairs honestly and with due regard for the public good. All this is commendable and must receive the sanction of every good citizen, but, in this age of agitation, such as the world has never known before, *we want to be careful lest we carry the doctrine of governmental paternalism too far, for, after all is said and done, the prime factor in our scheme of government is the American home.*" (Italics ours.)

E. A dilemma confronting Appellants. "Religious observance and education"

Appellants find themselves in a serious dilemma when confronted with the fact that the Statute which they assail provides comprehensively in a single sentence:

> "Absence for religious *observance* and education shall be permitted * * *."

In their reply brief in the Court of Appeals (pp. 9-10) appellants endeavored to sidestep this dilemma by saying:

> "Respondents and intervenor also argue that permitting children to be excused from public school for religious observance, i.e., religious holy days, is in the same category as absence for religious instruction, under the released time program (Sec. 3210, Ed. Law). *The question of such holy days is not involved in this proceeding and has not been and need not be argued by these petitioners. That untested statute and practice can carry no weight here.* Until such practice and the statute and regulations permitting it have been

held authoritatively to be constitutional, the subject matter has no possible bearing on the issue of the constitutionality of the New York released time system." (Italics ours.)

Parenthetically, we point out that the Statute does *not* make the restriction of "religious observance" to "religious holy days" which the appellants thus attempt to read into it.

Of this statutory fusion of "religious observance and education" the opinion of the Court of Appeals said (R. 121):

> "Excuses from attendance are permitted for many good reasons; among others, children are excused from school on holy days set apart by their respective faiths, thus producing a most obvious form of divisiveness, not paralleled in the released time program. *Indeed we are all agreed that refusal to excuse children for that reason would be an unconstitutional abridgement of freedom of religion.* If it be constitutional to excuse children of a particular faith for entire days for such a religious purpose, it seems clear, by a parity of reasoning, that it is also constitutional, under the circumstances here presented, to excuse children of whatever faith one hour a week for another and similar religious purpose." (Italics ours.)

By what process of reasoning can it be claimed that the Constitution *requires* the State to excuse children of a particular faith or denomination, at parental request, for "religious observance," while insisting that the same Constitution *forbids* the State to excuse children of all faiths, likewise at parental request, for "religious instruction"?

And how has a civil court authority or competence to determine what is "religious observance" as distinct from

"religious education"; or to insist on constitutional grounds that the "religious observance" for which absence must be granted shall not in itself be or contain "religious education"; or to separate the inseparable in religion, to-wit, the "education" in the "observance" and the "observance" in the "education"? As said of old (*Deuteronomy*, ch. 12, v. 28):

> "*Observe and hear* all these words which I command thee, that it may go well with thee, and with thy children after thee for ever."

Every assembly in a church for spiritual purposes is inherently both religious observance and religious education.

A thesis that the United States Constitution commands absence for the one but forbids absence for the other would plunge the subjects of Church and State and of abridgment of the freedom of religion into a speculative abstruseness for which a civil court has neither the means nor the jurisdiction.

If, as appellants argue, it is "divisive" to release children in accordance with their parents' request for religious instruction, it is much more "divisive", as the Court of Appeals said, to release children, in accordance with the mandate of the same Statute, for religious observance. Children released for religious instruction are excused all together at the same time on the same day,—Catholics, Jews and Protestants alike. When it comes to religious observance, however, children of each faith or denomination are released on separate occasions in accordance with the observance required by their particular faith or denomination.

F. The New York Education Law negatives the predicates of the Appellants' arguments

(1) Appellants argue that the program of permitting absence by children, whose parents voluntarily ask it, for one hour each week for the purpose of religious observance or of religious instruction outside the public school premises, is unconstitutional because

> "pupils compelled by law to go to school for secular instruction are released in part from their legal duty, upon the condition that they attend the religious classes." (Petition, Par. THIRTEENTH, R. 20).

This argument has many conclusive answers.

The law of New York says nothing about compelling children "to go to school for secular instruction", or that education thereunder shall be exclusively within the public school building itself or any other building. The phrase "secular education" is nowhere mentioned in the Education Law.

Nor has the State of New York "legally prescribed and required" legal duty or hours which any absence recognized and permitted by the Education Law itself can be said to curtail or violate.

Appellants are entirely mistaken when they say (their brief, p. 43):

> "The New York statute requires all children not attending parochial or private schools to attend public school for 'full time day instruction' ".

There is no such requirement. The New York statute requires simply that children shall receive an education *either "at a public school or elsewhere"* during 190 days of each school year, and that they shall be in regular attendance during the time the appropriate public schools

are in session, subject to such reasonable absences as the law itself recognizes and permits (Education Law §§3204, 3210). In fact, they do not have to attend any school, public or private, but may be educated by their parents at home or "elsewhere". *People* v. *Turner*, 277 App. Div. 317, 319 (4th Dept., 1950), quoted *supra*, page 8. As the Court of Appeals recognized in the case at bar, and as the Board of Education maintains here (its brief, pages 27-8), the requirements of the statute (Section 3204) are fully satisfied if part of the child's time is spent "at a public school" and part of it is spent "elsewhere", provided the State's minimum requirements are met (Rec. 121-2).

Moreover, as the Court of Appeals pointed out in the case at bar

> "The Education Law does not fix the number of hours that constitute a school day" (R. 121).

And the New York City Board of Education has in fact provided more days than the 190 required by Section 3204 (R. 41-5).

The only requirement as to classes—whether in the public school or "*elsewhere*"—is that they shall provide for "at least" instruction in the ten common school branches of reading, writing, arithmetic, spelling, the English language, geography, United States history, civics, hygiene* and physical training, to which, by recent amend-

* In 1950, at the request of representatives of the Christian Science Church, the Legislature enacted an amendment to Section 3204 dealing with the required teaching of hygiene. This amendment provides

> "Subject to rules and regulations of the Board of Regents, a pupil may be excused from such study of health and hygiene as conflicts with the religion of his parents or guardian."

In approving this amendment, the Governor filed a memorandum which stated that the bill

> "merely gives to the Board of Regents the power to make such adjustment as it believes necessary to assure the religious liberty of

ment has been added the history of New York (Education Law §3204[3]. These requirements apply equally to pupils not enrolled in the public schools (Education Law §3204 [2]).

There is no requirement that the entire school day shall be spent by each pupil in instructions in those ten branches and in none other.

There is no specification of the kind or nature of instruction which *must* be given to every pupil during the remaining hours of the school day.

All such matters have been left to the discretion respectively of local school authorities, subject to the reasonable requests of parents. (*People ex rel. Lewis* v. *Graves,* 219 App. Div. 233, 237-8, affd. 245 N. Y. 195 [1927]).

(2) Nor is there any requirement in the New York Education Law that the whole of a child's education shall be given in one place only.

In its opinion the Court of Appeals truly said (R. 121):

> "Moreover, parents have the right to educate their children elsewhere than in the public schools, provided the State's minimum requirements are met (Education Law, §3204; *Pierce* v. *Society of Sisters, supra*), and thus, if they wish, choose a religious or parochial school where religious instruction is freely given. That being so, it follows that parents, who desire to have their children educated in the public schools but to withdraw them therefrom for the limited period of only one hour a week in order to receive religious instruction, may ask the public school for such permission, and the school may constitutionally accede to this

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the child and its parents consistent with the requirements of public education and public health * * *.

"I believe it to be a simple fundamental of freedom of religion that the state shall compel no child to learn principles clearly contrary to the basic tenets of his religious faith."

parental request. There is nothing in the Constitution commanding that religious instruction may be given on the Sabbath alone, and on no other day."

In line with this, the Board of Education of New York City in its brief herein at page 27 takes the entirely reasonable and proper position that a parent

> "*has the right to have his child receive part time instruction in public schools and part time instruction in the parochial schools.*" (Italics ours.)

Appellants concede that under the doctrine of the *Pierce* case a parent has an absolute constitutional *right* to keep his child out of the public school for full time instruction elsewhere—either in a private or parochial school or at home. On what conceivable theory can they claim that a parent is under an absolute constitutional *prohibition* against being permitted by statute briefly to keep his child out of the public school for religious instruction for one hour a week in a parochial school or other religious center?

(3) There is, of course, a physical and mental limit upon the time during which any child is capable of beneficially receiving formal, required instruction in school and also at home through fulfillment of the school's required "home-work".

While the New York Education Law does not specify the number of hours which shall be fixed for any school day, we believe it to be the recent practice of local boards of education to fix a school day of five to five and one-half hours, not including the lunch period. It is generally recognized that such a period of time, augmented by time absorbed by required "home-work", closely approximates, if it does not completely exhaust, the total number of hours of the child's time, exclusive of time necessary for

rest and recreation, which may be efficiently used for formal instruction.

Certainly, the State itself has the lawful power to recognize and determine that such is for the average child the limit of capacity for formal instruction.

For the courts ever to uphold as a principle of law that the State not only can but *must* monopolize the entire instructionable day of the average child for such educational content and ideology as it might choose to impose, would be to nullify the parent's fundamental rights in the education of his children, and to sanction a means for overwhelming both religion and liberty.

(4) At page 63 of their brief appellants' counsel say:

> "The effectiveness of the released time program (to the extent that it is effective) rests upon the compulsory school attendance law. It operates only because the state has the power to corral children and require them to obtain secular education for a given number of hours weekly."

Precisely the same is true as to the whole system of parochial and private education constitutionally guaranteed by the *Pierce* case. If a child is enrolled in a parochial school furnishing sectarian education, he attends there under the "compulsion" of the same sections of the same Education Law as apply to another child enrolled in the public school across the street.

Appellants' argument on this score,—advanced in the name of "freedom of religion"—amounts to a contention that the state is constitutionally *compelled* to require attendance on an "all or nothing" basis,—either all parochial school or all public school; and that it is constitutionally forbidden to recognize even the possibility of such a thing as enrollment in the one accompanied by brief part time enrollment in the other.

POINT II

The New York statute authorizing released time is designed to give reasonable protection to liberty of conscience and freedom of religious profession on the part of parents.

No constitutional provision erects a gateless "wall of separation" between the State and parents, or between parents and their children, in the matter of public education.

(1) Every thoughtful observer of contemporaneous American trends in thinking is aware of an increasing conviction throughout our country that the crisis at home and abroad is *a moral crisis*, and that the real danger which confronts us is not the massing armed power of Soviet Russia which we can defeat, but rather is in our own midst and consists of the deadening secularism in America and the western world which threatens to choke the sources of spiritual power.

More and more people in America are becoming anxiously concerned with the warning given by President Wilson that no nation can long be preserved materially unless it is first preserved spiritually. More and more people are realizing that daily the truth becomes clearer that we have been looking to our great wealth and material resources as a sort of Maginot Line; whereas our real defenses and our leadership in the world as well as the integrity of our national life must rest on and derive from spiritual vitality, verity and power.

In consequence, more and more people have become concerned lest we have been taking too much for granted in and about our vast systems of secular education, and in the common assumption that "education" as a term

carries as a corollary "character" and "integrity" and "moral and spiritual values".

How far this increasing concern has affected even the most outstanding experts in our present system and practice of education, is shown by the following quotations from the annual report made several months ago by Dr. Oliver C. Carmichael, as President of the Carnegie Foundation for the Advancement of Teaching (p. 15):

> "The recent revelations of low standards in high places, of outright corruption in public office, of widespread organization of gambling and crime, of basketball and football scandals and of honor code violations, should surely be sufficient to arouse the American people and to shock educational leaders into a reexamination of their goals and methods. In a country which numbers only seven per cent of the population of the world, but which has more young men and women in college than all the rest of the world combined, the educational system can scarcely escape a share of the responsibility for the conditions revealed. These are but symptoms of a collapse of moral and spiritual values which should stir to action parents of children, leaders in public affairs, schools, colleges and churches."

And in the same report Dr. Carmichael further said (p. 20):

> "At present there is no adequate machinery in operation for discovering the nature of the obscure forces at work that undermine *real* education and, therefore, no means of coping with them. * * * Yet there is no doubt that the intellectual, moral, and spiritual tone of an institution is more important than its libraries and laboratories, its classrooms and student centers, or even its researches and publications." (The italics are Dr. Carmichael's.)

When educational leaders like President Garmichael thus recognize these "symptoms of a collapse of moral and spiritual values", with which our present system of education has "no means of coping", deeply concerned parents and thoughtful citizens have a right to feel that constitutional interpretations which would exclude all possibility of mutual accommodation in this matter between parents and the State could "scarcely escape a share of the responsibility for the conditions revealed."

(2) The public schools of today, with attendance compulsory for most of our children, have expanded to the dimensions of life itself. They provide for the education of children in practically every human interest except religious faith. They extend their secular instruction to matters of origin, destiny and human relationships, with all of which religion is vitally concerned.

In the opinion of multitudes of parents, the omission and ignoring of religion by such schools can convey (however unintentionally) a powerful disparaging implication and inclination of mind.

These parents have the constitutional right to a conviction, and indeed have the conviction deep in their hearts, that there is in the present system of public secular education at least an implied negation and exclusion of spiritual ideals and spiritual faith, and that such implied negation and exclusion are at the root of much of the disorders and evils of our times. They desire, and have the right, not to be burdened after their children's "business hours" with the task of undoing the implications which they fear.

The New York Statute does no more than to give to such parents a means of fulfilling that conviction and of discharging what they regard as their high duty not only toward their children but toward the system of public

education itself and toward democracy itself. It enables them to show to their children that Education and the State are not opposed to religion and do not invite it to be ignored, and that the State does not intend to negate or disparage the conscience and faith of the parents by monopolizing the child's "business hours" for a wholly secular education.

Who has the "right" to deny such parents that right?

Do those who would so impose *their will* get their "right" to do so from some assumed privilege of primacy for their own beliefs, or from some alleged majority will, or from some supposed prerogative of the State?

An affirmative answer to any of these three alternatives denies the doctrine of the *Oregon School Law* case and strikes at the basic freedom on which all individual liberty must rest. Yet it is an affirmative answer which these appellants are now asking this Court to force upon an unwilling State of New York, notwithstanding that, in the American system, it is the parent, not the State, who has the guidance of the mind of the child.

(3) Article 26 of the *Declaration of Human Rights* adopted by the General Assembly of the United Nations on December 10, 1948 provides:

> "(3) Parents have a prior right to choose the kind of education that shall be given to their children."

And the proposed *International Covenant on Human Rights and Measures for Implementation*, adopted in May 1951 by the United Nations Commission on Human Rights, provides:

> "In the exercise of any functions which the State assumes in the field of education, it shall have respect for the liberty of parents to ensure the religious education of their children in conformity with their own convictions."

(4) Under the secular techniques of our present public and compulsory educational system, the First of the Two Great Commandments is allowed no place in the curriculum of public-school study.

What, then, are the rights of parents who feel that this exclusion will convey to their children that the First Commandment has no primary place in life or allegiance or even is of no account, and that in a generation or two the Second Commandment, which is like unto the First, must consequently follow it into neglect and oblivion?

Overseas, we have seen to our terrible cost that great peoples who were led to embrace a system of ideological education which omitted the First Commandment, soon accepted the thesis that the Second Commandment had no application where it interfered with the purposes of the State and that any kindness which interfered with the official ideology would be severely punished as a sin against the State and even as treason.

At home, a member of this Court recently said in a broadcast statement:

> "We need the faith of our fathers. We need a faith that dedicates us to something bigger and more important than ourselves or our possessions. Only if we have that faith will we be able to guide the destiny of nations, in this the most critical period of world history."

As to what was "the faith of our fathers" we have the answer in the Declaration of Independence, the reading of which in our public schools would by appellants' logic and by some of their supporters be prohibited, on the ground that its declaration that all men are endowed by their Creator with certain inalienable rights, including the right to be free and equal, is religious doc-

trine which the First and Fourteenth Amendments to the Constitution exclude from profession or teaching on public property.

(5) It cannot be too strongly emphasized that what appellants here demand is the complete destruction of a purely *voluntary* plan merely because they do not wish to take advantage of its permissive features for their own children.

What appellants say in substance is this:

> "Because we do not want our children to be excused at 2 P. M. on Wednesday for religious instruction elsewhere, therefore all other parents are forbidden by the Federal Constitution to ask to have their children so excused".

Let us consider for a moment the inevitable implications of a holding such as appellants now ask.

In *West Virginia Board of Education* v. *Barnette, supra,* 319 U. S. 625, the Jehovah's Witnesses, on conscientious grounds, asked to have their children excused from the flag salute ceremony. They did not ask, and this Court did not require, that the flag salute ceremony be abolished *in toto* for all other children. On the present appellants' theory, if any one parent objected to the flag salute on religious or anti-religious grounds, he would have a constitutional right to abolish it for all other children, because otherwise there would be divisiveness and his child would be conspicuous.

By recent statute, the State of New York has provided in substance that Christian Science children may be excused from the study of such portions of hygiene (*e. g.* the germ theory) as conflict with their religious beliefs. On the present appellants' theory, a single Christian

Science parent could require the complete abolition of such study from the school curriculum for all children.

In the *McCollum* case Mr. Justice Jackson said (333 U. S. 203, at p. 235):

> "If we are to eliminate everything that is objectionable to any of these warring sects or inconsistent with any of their doctrines, we will leave public education in shreds".

Appellants would go even further. By eliminating, on constitutional grounds, any possibility of accommodation between the public education system and parental consciences, they would force all parental consciences and public education itself to conform to their own views. In other words, they insist that the United States Constitution establishes their own freedom of conscience and belief as the compulsory norm for all other parents' freedom of conscience and belief!

POINT III

The New York statute and regulations present a situation altogether different from that of the *McCollum* case.

(1) Throughout their brief appellants rely chiefly, if not solely, on the decision of this Court in *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203 (1948).

The holding of the *McCollum* case was carefully analyzed, and its application distinguished, by Judge Froessel for the Court of Appeals. We cannot do better than to adopt and quote his words (R. 116):

> "In support of their contention, appellants rely primarily on *Illinois ex rel. McCollum* v. *Board of*

Educ. (333 U. S. 203). There, a local board of education in Champaign County, Illinois, participated in a released time program which differed radically from the one before us. There was no underlying State enabling act. Religious training took place in the school buildings and on school property. The place for instruction was designated by the school authorities. Pupils taking religious instruction were segregated by school authorities according to faiths. School officials supervised and approved the religious teachers. Pupils were solicited in school buildings for religious instruction. Registration cards were distributed by the school, and in one case printed by the school. None of these factors is present in the case before us, and, accordingly, the Supreme Court's holding that the Champaign released time program was constitutionally invalid is not controlling here.

"In the New York City program there is neither supervision nor approval of religious teachers and no solicitation of pupils or distribution of cards. The religious instruction must be outside the school building and grounds. There must be no announcement of any kind in the public schools relative to the program and no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction. All that the school does besides excusing the pupil is to keep a record—which is not available for any other purpose—in order to see that the excuses are not taken advantage of and the school deceived, which is, of course, the same procedure the school would take in respect of absence for any other reason.

"It is manifest that the *McCollum* case (*supra*) is not a holding that all released time programs are per se unconstitutional. The Supreme Court's decision is limited to the fact situation before it. Thus, Mr. Justice Black, writing for the Court, reviewed the evidence so far as undisputed and stated (p. 209) that the 'foregoing *facts*' (emphasis supplied) 'show the use of tax-supported property for religious in-

struction and the close co-operation between the school authorities and the religious council in promoting religious education.'

"In the instant case, there is no 'use' of tax-supported 'property or credit or any public money' 'directly or indirectly' 'in aid or maintenance' of religious instruction (*People ex rel. Lewis* v. *Graves*, 245 N. Y. 195, motion for reargument denied 245 N. Y. 620, affg. 219 App. Div. 233, affg. 127 Misc. 135), and there is no such co-operation as in the *McCollum* case (*supra*) between the school authorities and the religious committee in promoting religious education.

"Other justices who wrote in the *McCollum* case were even more explicit in placing boundaries on the determination. Mr. Justice Frankfurter, in a concurring opinion in which three other justices joined, stated:

> "'Of course, "released time" as a generalized conception, undefined by differentiating particularities, is not an issue for Constitutional adjudication' (p. 225).
>
> "'The substantial difference among arrangements lumped together as "released time" emphasize the importance of detailed analysis of the facts to which the Constitutional test of Separation is to be applied. How does "released time" operate in Champaign?' (p. 226)
>
> "'We do not consider, as indeed we could not, school programs not before us which, though colloquially characterized as "released time," present situations differing in aspects that may well be constitutionally crucial. Different forms which "released time" has taken during more than thirty years of growth include programs which, like that before us, could not withstand the test of the Constitution; others may be found unexceptionable' (p. 231).

"Mr. Justice Jackson, in addition to agreeing with the limitations expressed by Mr. Justice Frankfurter,

added reservations of his own, and stated: 'we should place some bounds on the demands for interference with local schools that we are empowered or willing to entertain' (p. 232),

and that 'it is important that we circumscribe our decision with some care' (p. 234).

"Mr. Justice Reed, who dissented from the Court's holding, pointed out (pp. 239-240) that expressions in the opinions of his colleagues 'seem to leave open for further litigation variations from the Champaign plan.' "Thus, in addition to the reference in Court's opinion to the 'foregoing facts' of the Champaign plan as showing its unconstitutionality, *we have five other justices expressly agreeing that released time as such is not unconstitutional.*". (Italics ours.)

(2) In the opinions of both Mr. Justice Black and Mr. Justice Frankfurther emphasis is placed on the finding that by the Champaign Plan of Released Time both Church and State were "*integrated*" in the same building, under the same supervisory authority, and in the same classrooms, with the consequent common "use of tax supported property"" (pp. 209, 231).

Mr. Justice Frankfurter held that this integration was "confusing, not to say *fusing*, what the Constitution sought to keep strictly apart" (p. 231).

In the New York Plan there is neither such "integration" nor such "fusing". There is nothing more than a recognition by public authority that religious instruction at the request of those parents who desire it for their own children is at least as valid an excuse for absence as instruction in music or other matters regularly and consistently recognized as legitimate excuses under the State Education Law.

(3) The differences between the two Plans are well set forth as follows in the opinion of Mr. Justice Elsworth in the second *Lewis* case (193 Misc. 66, 72) and in the opinion of the Special Term in the case at bar (R. 89-91):

"Champaign Plan"	New York City Plan
1. No underlying enabling state statute.*	1. Education Law, §3210 is the enabling statute which provides that "absence from required attendance shall be permitted only for causes allowed by the general rules and practices of the public school"; and further provides that 'absence for religious observance and education shall be permitted under rules that the commissioner shall establish.'
2. Religious training took place in the school buildings and on school property.	2. Religious training takes place outside of the school buildings and off school property.
3. The place for instruction was designated by school officials.	3. The place for instruction is designated by the religious organization in cooperation with the parent.
4. Pupils taking religious instruction were segregated by school authorities according to religious faith of pupils.	4. No element of segregation is present.
5. School officials supervised and approved the religious teacher.	5. No supervision or approval of religious teachers or course of instruction by school officials.

* There was no Illinois statute which declared that "absence for religious observance and education shall be permitted."

"Champaign Plan	New York City Plan
6. Pupils were solicited in school buildings for religious instruction.	6. School officials do not solicit or recruit pupils for religious instruction.
7. Registration cards distributed by school. In at least one instance, the registration cards were printed at the expense of school funds.	7. No registration cards furnished by the school or distributed by the school. No expenditure of public funds involved.
8. Non-attending pupils isolated or removed to another room.	8. Non-attending pupils stay in their regular classrooms continuing significant educational work.
	9. No credit given for attendance at the religious classes.
	10. No compulsion by school authorities with respect to attendance or truancy.
	11. No promotion or publicizing of the released time program by school officials.
	12. No public moneys are used."

(4) Indeed, the basic factual difference between the *McCollum* case and the present case is graphically stated at pages 41-2 of appellants' own brief, where it is said that the proof in the *McCollum* case

> "established that general Protestant instruction was given in the regular classroom in the presence of the regular public school teacher, while Catholic instruction was given in basement rooms and Jehovah's Witnesses and Lutherans were excluded altogether."

(5) The stenographic transcript of the oral argument in the *McCollum* case indicates that both the members of this Court and the counsel for the appellant Mrs. McCollum were fully aware of the distinction between the New York Plan and the Champaign Plan then under attack. That transcript shows the following colloquy (pp. 26, 27):

> "*Mr. Justice Jackson.* If your position is sustained, how would that affect the Released Time Plan in New York?
>
> Mr. Dodd [Counsel for appellant McCollum]. The Released Time Plan has been sustained since 1929 in New York. It has recently been sustained in Illinois, and more recently sustained in California. *I don't think it would be affected by an adverse decision relative to this situation.*
>
> * * * * * * * * *
>
> *Mr. Justice Frankfurter.* You said the New York system could survive although this system should fall. What are the decisive elements that differentiate the two?
>
> Mr. Dodd. The point is that here they are to take their religious lessons *in groups in the schools* where there will be, somewhat of necessity, unless the world has changed as to religion, some development of friction and trouble as between religious groups." (Italics ours.)

(6) In line with the position thus stated on the argument by Mrs. McCollum's counsel, his brief cited, with apparent approval, the earlier decisions of the New York Courts in *People ex rel. Lewis* v. *Graves,* 219 App. Div. 233, and 245 N. Y. 195; and at page 19 he carefully distinguished and limited the issues in his own case in these words (p. 19):

> The issue now for the first time presented to this Court involves (1) a public service to sectarian public

school instruction through both personal help and school facilities, (2) an instruction in the school building and during school hours which will segregate the various religious and non-religious groups in the public school, and (3) a control by the school authorities of what religious views may be taught and how they may be taught."

And in his conclusion Mrs. McCollum's counsel again formulated the issue as follows (p. 34):

> "The Appellant asks this Court to determine whether sectarian groups may be permitted to teach in public school buildings during school hours, and substantially as part of the public school system. If such teaching is permitted, Appellant asks if school authorities may be permitted to determine who shall teach and what may be taught."

In his Reply Brief Mrs. McCollum's counsel said (p. 13):

> "New York may be regarded as the leader of the plan of released time, and explicitly limits it to 'outside of the school buildings and grounds.' The Illinois Supreme Court has sustained a similar plan. * * * *The released time plan is directly opposed to the plan at issue in the present case* * * *
>
> "It is clear here, also, that the released time plan lends no support to Appellees' plan of sectarian education of public school pupils in public school buildings and during school hours." (Italics ours.)

(7) In the footnote at page 34 of their brief, appellants' counsel cite an opinion of the Solicitor of the Interior Department as applying the *McCollum* decision to prohibit released time instruction in Indian schools; and, in the footnote at page 58, they cite the recent Organic Act of Guam which forbids the use of public money or property directly or indirectly for sectarian purposes.

Hence, it is important for this Court to know that the Solicitor of the Interior Department has recently rendered a further opinion (M-36106, dated October 30, 1951) approving the legality, under this Organic Act, of a released time program for public school students in Guam copied directly from the New York plan, and has therein stated:

> "I share the view of the New York courts that the *McCollum* decision did not necessarily outlaw all released-time programs, and that programs similar to the New York City program (e. g. the proposed program for Guam) are not violative of the First Amendment."

(8) At page 22 of their brief appellants' counsel now assert:

> "In the *McCollum* case, briefs *amicus curiae* in opposition to released time were submitted in behalf of the Baptists Joint Conference Committee on Public Relations, representing the largest Protestant denomination in the United States * * *."

While it is quite true that the Baptists Conference opposed the Champaign plan in the *McCollum* case, appellants fail to acknowledge that, with respect to the altogether different New York Plan now presented, the New York Court of Appeals accepted a brief *amicus curiae* from the National Council of the Churches of Christ in the United States of America, representing substantially all the major Protestant and Orthodox bodies of the United States, *including the Baptists;* and that in such brief the National Council strongly supported the New York Plan. (See Official Report, 303 N. Y. 161, 166.)

(9) At pages 22 and 57 of the appellants' brief their counsel cites "*2 Stokes, Church and State in the United States,* 534, 548" for propositions which the text in no way

sustains. We are, however, glad the appellants thus acknowledge as an authority this publication by Dr. Anson Phelps Stokes, former Secretary of Yale University, which is the latest exhaustive and learned discussion on the subject.

In Volume II of that monumental work, Dr. Stokes discusses and analyzes at great length the *McCollum* case dealing with the altogether different Champaign Plan of Released Time (pp. 515, *et seq.*), and concludes (p. 522):

> "It (the *McCollum* decision) does not, of itself, seem to prevent either the objective study of the history of religion in public schools under public-school teachers (which Dr. C. Morrison has so long advocated), *or the dismissal of students to study religion in the churches or synagogues of their choice, such as is provided by the laws of New York and other states, and is advocated by many representative Protestant, Catholic, and Jewish groups.*" (Italics ours.)

And at page 536, in referring to the decision of the Court of Appeals in the first *Lewis* case (245 N. Y. 145), Dr. Stokes says:

> "This decision is of special interest because it was concurred in by Chief Justice Benjamin N. Cardozo (1870-1939), later a member of the Supreme Court of the United States, and recognized as one of the greatest of American jurists."

On the same page (536) Dr. Stokes refers to like statutes authorizing the Plan in the following states: California, Hawaii, Illinois, Indiana, Iowa, Kentucky, Maine, Massachusetts, Minnesota, New York, North Dakota, Oregon, Pennsylvania, South Dakota.

(10) The appellants' brief states (p. 32) that the undersigned, Charles H. Tuttle, submitted one of the briefs *amici curiae* to the United States Supreme Court in the

McCollum case. That fact, standing alone, is true; but it is not the whole fact. That brief was submitted on behalf of the Protestant Council of the City of New York. It was confined to informing the Court about the New York Statute and Plan of Released Time. It did not advocate the altogether different Plan, known as the Champaign Plan, which was the sole Plan in issue in the *McCollum* case. We attribute to that brief *amicus curiae* about the New York Statute much of the emphasis in the opinions in the *McCollum* case that the Court was only passing on the particular Plan (the Champaign Plan) then before it.

POINT IV.

The Petition presents no triable issue of fact.

This is so for a number of separate reasons:

(1) This is a statutory appeal under Section 1257(2) of Title 28 of the U. S. Code permitting an appeal "where is drawn in question the validity of a statute on the ground of its being repugnant to the Constitution, treaties or laws of the United States and the decision is in favor of its validity" (R. 145-6).

The "Jurisdictional Statement" submitted to this Court by the appellants and omitted in the printing of this Record (R. 152, fol. 167) cites and quotes the above statute as *the* "Statutory Provision Sustaining Jurisdiction" and as the reason why "the appeal is within the jurisdiction of the United States Supreme Court." The *"Jurisdictional Statement" assigns no other ground of jurisdiction.*

The only statute claimed herein to be "repugnant to the Constitution of the United States" is Section 3210-1(b) of the New York Education Law.

If that Statute, as and when enacted, was *not* "repugnant to the Constitution of the United States", then the statutory ground for this statutory appeal and for the jurisdiction of this Court in this case is exhausted. *That issue* is solely one of constitutional law; and a determination thereof against repugnancy resolves the only federal question which can be presented through the channel of this appeal, and which can supply jurisdiction.

The petition makes no claim that the regulations are not authorized by the Statute if the Statute itself be valid. It asks for no revisions thereof or elimination therefrom.

A question whether Section 3210-1(b), as and when enacted, was repugnant to the Constitution, could not possibly present a question of fact to be tried.

A question as to whether there has been unconstitutional administration of a constitutional statute in such wise as to injure the plaintiffs' constitutional rights is not one which can be brought to this Court by direct appeal. It can be brought here "*only on petition for a writ of certiorari*": (*Zucht* v. *King*, 260 U. S. 174, 177.)

(2) Moreover, Paragraph Twenty-third of their petition states the issue which the appellants tender and what they want. They want an adjudicatory declaration that (R.22):

> "TWENTY-THIRD: Rescissions of the aforesaid regulations and discontinuance of the released time program are *non-discretionary* duties imposed upon the respondents by the Constitution of the United States and of the State of New York as aforesaid." (Italics ours.)

The prayer for relief in the petition is identical with the issue thus framed. It prays for an order directed against the respondents commanding the respondents

forthwith and unconditionally to "abrogate and rescind *all* regulations" "and to discontinue the released time program": *in toto* (R. 23).

Thus, the sole issue tendered by the petition was whether or not the New York Statute authorizing absence for religious observance and instruction under regulations to be established by the State Commissioner of Education could constitutionally be a lawful source of power for any regulations at all.

The appellants' claim now is, and can only be, that the statutory authority to promulgate regulations is annulled because the Constitution of the United States has "imposed" the "non-discretionary duties" of not fulfilling at all the purpose expressed in the Statute's primary clause.

Hence, both logically and literally, the appellants' petition comes down to the proposition that the Constitution of the United States has "imposed upon the respondents" the "non-discretionary duties" of not permitting absence for the purpose for which the Statute directs that absence shall be permitted. *That issue is one of constitutional law.*

If the Statute permitting such absences was valid when enacted, the included duty to establish regulations therefor was then also valid. Any "non-discretionary duties" not to establish regulations for the purpose could arise only if, as of the time when the statute was enacted, the Constitution of the United States then forthwith "imposed upon the respondents" the "non-discretionary duties" of disregarding the Statute altogether.

(3) In the Supreme Court, Kings County, Mr. Justice DiGiovanna said of the petitioners' position as stated before him in their brief (R. 96):

> "The attorney for the petitioners, in his memorandum relative to the merits of the petitioner's application and the legal sufficiency of the petition says

(p. 9): 'It is submitted that it is not the details of a particular released time program which render it violative of the First Amendment; it is the basic concept—the raison d'etre of the program, which causes it to run afoul of the Amendment as interpreted in the Everson and McCollum decisions."

And Mr. Justice DiGiovanna then concluded (R. 96-7):

"In the face of a holding that the statute attacked is constitutional, we next come to the question of whether triable issues are presented. What are the issues raised by this proceeding other than the question of constitutionality? There are no degrees of constitutionality. Neither does compliance with the statute render it constitutional if it is unconstitutional, nor does administrative error render it unconstitutional if it is constitutional. * * * This court cannot agree, therefore, with the argument of counsel for the petitioners that it has before it the question of whether or not the program is being conducted in accordance with the regulations. Indeed, there is no proof that it is not, while there is proof, immaterial to this special proceeding, that it is being so conducted in the particular schools attended by the children of these petitioners. In fact the attorney for the petitioners, in the citation from his brief above quoted, concedes that fact. The question validly presented by this proceeding is solely addressed to the constitutionality of the statute and regulations."

Subsequently the appellants moved for reargument on two grounds, to wit: (1) the absurd ground that Mr. Justice DiGiovanna may have overlooked Mr. Justice Black's opinion in the *McCollum* case, and (2) the further ground that he had "misinterpreted the factual theory of petitioners' proceeding".

Mr. Justice DiGiovanna denied the motion with an extended opinion (N. Y. L. J., Aug. 23, 1950, p. 299, col. 5).

Only a portion of that opinion is quoted in the appellants' brief (p. 73). We annex the full text as Appendix A to this Brief.

In the Appellate Division, the minority held the Statute unconstitutional as a matter of law, and hence did not consider matters of pleading. The majority said (R. 110):

> "Subdivision 1-b of section 3210 of the Education Law, which merely provides that absence from attendance on required instruction shall be permitted for the specified religious purposes under rules to be established, is in no way unconstitutional. Moreover, *if the truth of all of the well pleaded allegations of the petition is conceded,* petitioners have failed to allege facts sufficient to establish any invasion of their constitutional rights by the adoption of the regulations complained of, or the operation thereunder of the 'released time program' (cf. *People ex rel. Lewis* v. *Graves*, 245 N. Y. 195; *Matter of Lewis* v. *Spaulding*, 193 Misc., 66). *McCollum* v. *Board of Education* (333 U. S., 203), which may be readily distinguished on its facts does not require a contrary determination." (Italics ours.)

The opinion of the Court of Appeals decided in the following language, which we believe conclusive, these matters concerning relevancy and sufficiency in pleading according to the State's law (R. 122):

> "Appellants assert that in any event triable issues of fact are presented. A basic difficulty with this contention is that appellants now declare that they are prepared to show on a trial matters that have not even been properly pleaded. A great many of their allegations are conclusory in character (*Kalmanash* v. *Smith*, 291 N. Y. 142, 154), and, as appellants concede, have been lifted bodily from portions of the *McCollum* opinions, without the statement of adequate facts to support them (Civ. Prac. Act, §1288). * * *

"Moreover, many of the conclusory allegations suggest merely a disobedience of the rules and regulations. Such disobedience, while it might warrant the initiation of disciplinary proceedings against any of the offending teachers or principals, would in nowise warrant the relief prayed for, namely, a total discontinuance of the released time program and a rescission of all regulations established by the authorities. It is, of course, possible that a statute and regulations constitutional on their face may be administered in an unconstitutional way (*Snowden* v. *Hughes*, 321 U. S. 1; *Yick Wo* v. *Hopkins*, 118 U. S. 356), but in order to invoke this principle it must appear that there is 'an element of intentional or purposeful discrimination' by the enforcement authorities (*Snowden* v. *Hughes, supra*, p. 8). Here there is no allegation in the petition to that effect, and, indeed, even in appellants' brief and in the briefs *amici* supporting their position, 'The offer of proof was not an offer to show a pattern of discrimination consciously practiced' (*People* v. *Friedman, supra*, p. 81). Under the circumstances, whether the released time program is constitutional is solely a question of law, and the case has been so treated by Special Term as well as by the Appellate Division majority and dissenters."

(4) The present petition is modeled very closely upon the petition in the second *Lewis* case (299 N. Y. 564). The chief difference is that the present petition is sprinkled with additional conclusions of law, most of them lifted bodily,—as the Court of Appeals pointed out and as the appellants admit in their brief, p. 11,—from the legal reasoning in portions of the *McCollum* opinions. The prayers for relief in the two petitions are substantially identical.

Let us assume, for the sake of argument, that somewhere in some one of the hundreds of public schools in the five boroughs of New York some overzealous teacher has at some time "violated" some provision of either the

State regulations or the City regulations—*e. g.*, by commenting on the attendance or non-attendance of some pupil upon religious instruction, or by making some announcement in school about the Released Time program. If, after a lengthy trial, the appellants succeeded in establishing the existence of some such "violation," their appropriate remedy—as the Court of Appeals held—would at most be an administrative disciplining of the teacher concerned, and an admonition to observe the regulations more strictly in future. But that kind of disciplining is for the Board of Education or the State Commissioner. It is not the kind of remedy which a court could give in a mandamus proceeding under Article 78 of the New York Civil Practice Act.

Nor is it the kind of remedy which these appellants want or ask for.

An unconstitutional statute or regulation does not become constitutional because people observe it. Nor does a constitutional statute or regulation become unconstitutional because people do not observe it.

(5) The appellants' brief refers to Paragraph ELEVENTH of the petition (R. 19), which was described below by appellants' counsel as the "heart of his case".

Apart from conclusions of law, this paragraph is not materially different in substance from paragraphs 10 to 15 of the petition in the second *Lewis* case (Record on Appeal therein, fol. 40).

Taking its allegations from the standpoint most favorable to appellants, it seems to allege the following (R. 19):

(a) A distribution of signature cards by the Committee or "church authorities" "at or near the public school premises." Appellants do not venture the flat assertion that any cards have been distributed

"at"—much less "in"—public schools. The regulations specifically forbid any distribution of cards or any announcement or comment in the schools relative to the program (R. 16-8, 34), and no school teacher or employee may distribute cards anywhere (R. 34). The petitioners do not ask that the regulations be amended by confining the alleged distribution of cards to any given distance or by not allowing any distribution at all.

(b) A delivery by the public school authorities to the Committee or to religious centers of lists of children whose parents have asked to have them excused. The petitioners do not ask that the regulations be amended by including a prohibition of delivery of any lists at all.

(c) A conclusion of law pure and simple that parents who sign consent cards "thereby enter into an agreement with the public school authorities" for the release of their children for religious instruction outside the school premises. The Statute merely *permits* the absence,—precisely as in the case of any other permitted absence. Neither it nor the regulations call for any contract.

(d) A charge that the religious education given off the school premises is "sectarian"—whatever that may mean. Absence for "religious observance" could, with as much truth and relevancy, be said to be for a "sectarian" purpose. The essence of the New York plan is that the parent and not the public school is making the "sectarian" selection and designating the place. The dismissal from the school is "in the usual way and the school authorities have no responsibility beyond that assumed in regular dismissals" (R. 31, 34, 36).

What difference does any of these items make to appellants' case? Not one of them affects the ultimate question here, which is whether the respondent Commissioner and Board are under "non-discretionary duties", as appellants insist, to abrogate the regulations *in toto* and to disregard the mandate of the basic statute altogether and permanently.

(6) At pages 68-9 of his brief, appellants' counsel sets forth in parallel columns the Special Term's description of the New York plan as compared with the Champaign plan involved in the *McCollum* case, plus appellants' conclusory statement as to "what the record shows" as to each item.

On the crucial points of difference (such as the fact that under the New York plan the religious training takes place on a voluntary basis off school property and without the supervision of school officials) appellants admit the correctness of the lower court's conclusions. On certain other items they make conclusory assertions to the contrary, which are immaterial and irrelevant, and with which we do not agree.

In this latter category we may take as an example item 6. Mr. Justice DiGiovanna pointed out (R. 91) that under the Champaign plan "pupils were solicited in school buildings for religious instruction", whereas under the New York plan "school officials do not solicit or recruit pupils for religious instruction."

As to this last, appellants assert that they "deny this and are prepared to prove the contrary".

No. 1 of the New York City regulations expressly provides (R. 30):

> "There will be no announcement of any kind in the public schools relative to the program."

And No. 6 of the same regulations prescribes

"There shall be no comment by any principal or teacher on the attendance or non-attendance of any pupil upon religious instruction."

If the regulations need amending, there is neither assertion or prayer to that effect in the appellants' petition. In such case, the appellants' remedy would have been to apply to the promulgating authority, and, failing action there, to institute a proceeding to void the offending regulation unless amended or to restrain any offending practice.

(7) The nearest that appellants come to a specific attack on any particular regulation is on pages 20 and 42 of their brief where they assert that Section 2 of the State Commissioner's regulations (R. 15) is unconstitutional, because it provides that "the courses in religious observance and education" conducted off the school premises must be "operated by or under the control of a duly constituted religious body or of duly constituted religious bodies".

The appellants' petition does not ask that this particular regulation be revised or abrogated; and it does not assert that they or anyone else have ever been adversely affected by it or have ever complained about it. The gravamen of the petition is that both the Statute and *all* the regulations be annulled altogether.

The reference in the regulation to "duly constituted religious bodies" should be considered in connection with Section 2 of the New York Religious Corporations Law, which defines a "religious corporation" as "a corporation created for religious purposes", and defines "churches", whether incorporated or unincorporated, as bodies organized for the purpose of "divine worship and other religious observances".

If this particular regulation is unconstitutional as a "censorship of religion", merely because it refers to "duly constituted religious bodies", then innumerable statutes, federal and state, requiring action by the civil authority predicated upon ascertaining a constituted religious body or denomination or a constituted minister thereof, are also unconstitutional as "censorship of religion".

For example, it would then be unconstitutional "censorship of religion" for Congress to provide, as in 10 U. S. Code, §231, that appointments of chaplains in our Armed Forces shall be made only "from among persons duly accredited by some religious denomination or organization, and of good standing therein". Indeed, the appellants' whole reasoning in this case would render unconstitutional *the whole chaplaincy statute itself*, together with its accompanying regulations, because under that statute the Civil Government appoints and commissions the chaplains according to religious affiliation, pays the chaplains with public funds to perform religious services according to their particular faiths, and provides at public expense edifices to which members of that faith may repair whenever "Church call" is sounded on the bugle (R. 131). If "divisiveness" so-called were real and were determinative of unconstitutionality, here it is, and right in our Armed Forces!

Other examples might be multiplied indefinitely. Some of them are given in the footnote.*

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* 50 U. S. C. App. §456-g, giving draft exemption to **"regularly or duly ordained ministers** of religion" and to "students preparing for the ministry under the direction of **recognized churches or religious organizations**, who are satisfactorily pursuing full time courses of instruction **in recognized theological or divinity schools"**.

26 U. S. C. §101(6) and (18), granting income tax exemption to, and permitting the deduction from taxable income of gifts to, corporations **"organized and operated exclusively for religious purposes"**.

49 U. S. C. §22, authorizing common carriers to give reduced rates to "ministers of religion".

N. Y. Penal Law, §925(b), which penalizes the fraudulent sale of tickets "for admission to or participation in services purporting to be in

Summary and Conclusion

In the *McCollum* case, Mr. Justice Jackson in his concurring opinion said (333 U. S. 237-8):

> "It is idle to pretend that this task is one for which we can find in the Constitution one word to help us as judges to decide where the secular ends and the sectarian begins in education. Nor can we find guidance in any other legal source. It is a matter on which we can find no law but our own prepossessions."

In the case at bar, we earnestly submit, no matter of "prepossessions" should arise.

The question for judicial determination here is not whether, or to what extent, religious training is a good thing, or what is the best way to give it.

The question is not whether, or to what extent, released time in any form, or in general, is regarded as desirable or undesirable by particular individuals or groups.

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accordance with the precepts of **any recognized religious creed or faith**", and the making of fraudulent representations "as to the nature of the services to be conducted at any place designated or intended to be used as a house of worship".

N. Y. Tax Law, §4(6), granting tax exemption to corporations "organized exclusively for religious purposes".

N. Y. Judiciary Law, §546(1), granting exemption from jury duty to "a clergyman or minister of religion officiating as such and not following any other calling".

N. Y. Tax Law, §4(10), giving tax exemption to "the real property of a minister of the gospel or a priest of any denomination being an actual resident and inhabitant of this state, who is engaged in the work assigned to him by the church or the denomination to which he belongs".

All such provisions necessarily require some civil authority to determine what is a "recognized religious organization", or who is a "minister of religion", or what is a "recognized theological or divinity school". It has never been seriously claimed that the making of such a determination is an unconstitutional "censorship of religion". On the only occasion when it was claimed that the placing of such bodies or persons in special categories is an "establishment of religion", this Court unanimously rejected the claim as unworthy of serious consideration. **Selective Draft Law Cases**, 245 U. S. 366, 376, 389 (1918).

The question is not whether the specific form of released time now before this Court is the best that could be devised, or whether some particular regulation could or should be amended or omitted.

The questions that are here to be decided are only two.

The first question is this:

Whose civil liberties and whose free exercise of religion are really under attack,—the liberties and freedom of these two appellants, who claim no injury to themselves or their children, or the liberties and freedom of the hundreds of thousands of religious parents in New York State who wish to educate their own children according to their own consciences?

The second question is this:

Can these appellants, under color of the First Amendment, categorically forbid the State of New York to let a religious parent take his own child out of a New York public school at 2 P.M. on Wednesday for instruction in his own religious faith at a religious center chosen by himself and conducted by private teachers of his own choice?

If they can, the intention of the Founding Fathers now operates in reverse, and the Bill of Rights has become an engine of tyranny.

The judgment and order appealed from should be affirmed.

Respectfully submitted,

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Appendix A

Opinion of Mr. Justice DiGiovanna, denying petitioners' motion for reargument

(N. Y. L. J., Wednesday, August 23, 1950, p. 299, col. 5)

"Matter of Zorach (Clauson)—This is a motion for a reargument of a motion heretofore decided by this court which sought to have declared unconstitutional the "released time" program for religious instruction now in effect in the public elementary schools of this city, and as an alternative request seeking the trial of issues allegedly raised by the petition and answering affidavits.

"Reargument is sought on two grounds. The first is that the court overlooked the binding effect of the opinion of Mr. Justice Black in People ex rel. McCollum v. Board of Education (333 U. S., 203). This court, it is true, quoted excerpts from the concurring opinion of Mr. Justice Frankfurter, who was one of the majority justices, as this court might properly do, to show the reasoning of various members of the court, and specifically to show a rational distinction between the Champaign plan there considered and the plan challenged herein. Furthermore, a court of concurrent jurisdiction in this state has spoken since the decision in the McCollum case upholding the constitutionality of a similar program (Matter of Lewis v. Spaulding, 193 Misc., 66, appeal withdrawn 299 N. Y. 564). Furthermore, the Court of Appeals of this state earlier upheld a similar plan in People ex rel. Lewis v. Graves (245 N. Y., 195). This court must reaffirm its determination of constitutionality on the basis of the above decisions and hold to its distinction between the New York and the Champaign plans.

"The second ground on which reargument is sought is that the court misinterpreted the factual theory of petitioners' proceeding. In support of this motion for reargument there have been submitted one conclusory affidavit of the attorney for the petitioners, one affidavit of a *former*

principal, four affidavits of *former* teachers, three affidavits from parents and three from former pupils. These affidavits outline what might be termed administrative difficulties.

"The moving papers on this motion have been duly considered by this court in arriving at its determination herein, even though such reargument must normally be based upon the papers submitted upon the original motion (Hauser v. Herzog, 141 App. Div., 522, 524; Matter of Hooker, 173 Misc., 515, 517).

"Reargument should not be granted unless it is shown that some question decisive of the case and duly submitted by counsel has been overlooked (Mount v. Mitchell, 32 N. Y., 702; Fosdick v. Hempstead, 126 N. Y., 651; Matter of Palmer, 193 Misc., 411). Nor may it be granted upon an additional showing of facts unless such facts occurred since the making of the original motion or permission to present such additional facts has been granted (Haskell v. Moran, 117 App. Div., 251, 252; De Lacy v. Kelly, 147 App. Div., 37, 38).

"Neither do the moving papers herein cite any contradictory decision of a higher court rendered subsequently to the decision of this court (Hand v. Rogers, 16 Misc., 364) nor that any controlling decision exists to which the attention of this court has not heretofore been called (Coleman v. Livingston, 45 How. Pr., 483).

"The moving papers herein show no valid reason for granting leave to reargue, but seem to be rather a plea to be allowed to renew the original motion upon additional facts not newly discovered.

"The motion for leave to reargue is denied."

Appendix B

Extracts from New York Education Law (McKinney's Consolidated Laws of New York, Volume 16, Part I)

SECTION 3204

Instruction required

"1. Place of instruction. A minor required to attend upon instruction by the provisions of part one of this article may attend at a public school or elsewhere. The requirements of this section shall apply to such a minor, irrespective of the place of instruction.

2. Quality and language of instruction; text-books. Instruction may be given only by a competent teacher. In the teaching of the subjects of instruction prescribed by this section, English shall be the language of instruction, and text-books used shall be written in English. Instruction given to a minor elsewhere than at a public school shall be at least substantially equivalent to the instruction given to minors of like age and attainments at the public schools of the city or district where the minor resides.

3. Courses of study. a. (1) The course of study for the first eight years of full time public day schools shall provide for instruction in at least the eleven common school branches of arithmetic, reading, spelling, writing, the English language, geography, United States history, civics, hygiene, physical training and the history of New York state.

(2) The courses of study and of specialized training beyond the first eight years of full time public day schools shall provide for instruction in at least the English language and its use, in civics, hygiene, physical training, and American history including the principles of government proclaimed in the Declara-

tion of Independence and established by the constitution of the United States.

b. For part time day schools. The course of study of a part time public day school shall include such subjects as will enlarge the civic and vocational intelligence and skill of the minors required to attend.

c. For evening schools. In a public evening school instruction shall be given in at least speaking, reading, and writing English.

d. For parental schools. In a parental school provision shall be made for vocational training and for instruction in other subjects appropriate to the minor's age and attainments.

e. Changes in courses of study. The state education department shall have power to alter the subjects of instruction as prescribed in this section.

4. Length of school sessions. a. A full time day school or class, except as otherwise prescribed, shall be in session for not less than one hundred ninety days each year, inclusive of legal holidays that occur during the term of said school and exclusive of Saturdays.

b. A part time day school or class shall be in session each year for at least four hours of each week during which the full time day schools are in session.

c. Evening schools shall be in session each year as follows:

(1) In cities having a population of one hundred thousand or more, on at least one hundred nights;

(2) In cities having a population of fifty thousand but less than one hundred thousand, on at least seventy-five nights;

(3) In each other city, and in each school district where twenty or more minors from seventeen to twenty-one years of age are required to attend upon evening instruction, on at least fifty nights.

5. Subject to rules and regulations of the board of regents, a pupil may be excused from such study of health and hygiene as conflicts with the religion of his parents or guardian. Such conflict must be certified by a proper representative of their religion as defined by section two of the religious corporations law."

Section 3205 prescribes that, with certain exceptions, attendance shall be compulsory from age 7 to age 16, and permits local boards of education in certain areas to raise the upper limit to age 17.

SECTION 3210

Amount and character of required attendance

"1. Regularity and conduct. a. A minor required by the provisions of part one of this article to attend upon instruction shall attend regularly as prescribed where he resides or is employed, for the entire time the appropriate public schools or classes are in session and shall be subordinate and orderly while so attending.

b. Absence for religious observance and education shall be permitted under rules that the commissioner shall establish.

2. Attendance elsewhere than at a public school. a. Hours of attendance. If a minor included by the provisions of part one of this article attends upon instruction elsewhere than at a public school, he shall attend for at least as many hours, and within the hours specified therefor.

b. Absence. Absence from required attendance shall be permitted only for causes allowed by the general rules and practices of the public schools. Absence for religious observance and education shall be per-

mitted under rules that the commissioner shall establish.

c. Holidays and vacations. Holidays and vacations shall not exceed in total amount and number those allowed by the public schools.

d. Exception. In applying the foregoing requirements a minor required to attend upon full time day instruction by the provisions of part one of this article may be permitted to attend for a shorter school day or for a shorter school year or for both, provided, in accordance with the regulations of the state education department, the instruction he receives has been approved by the school authorities as being substantially equivalent in amount and quality to that required by the provisions of part one of this article.

e. Registration of certain private schools. No person or persons, firm or corporation, other than the public school authorities or an established religious group, shall establish or maintain a nursery school and/or kindergarten and/or elementary school giving instruction in the ten common school branches of arithmetic, reading, spelling, writing, the English language, geography, United States history, civics, hygiene and physical training, unless the school is registered under regulations of the commissioner. Upon complying with the said regulations and after payment of a fee of twenty-five dollars a certificate of registration shall be issued by the department which shall be valid for a period of two years from the date of issuance unless suspended or revoked within said period pursuant to said regulations. Such registration may be renewed biennially thereafter upon the payment of a renewal registration fee of twenty-five dollars."

Section 3211 requires the keeping of specified attendance records, whatever the place of education may be,—whether public or private.